United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY ENTERED

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	:	Before:
COLUMBIA BROADCASTING SYSTEM	:	HON. MORRIS E. LASKER,
	:	District Judge
vs.	:	
	:	
AMERICAN SOCIETY OF COMPOSERS,	:	
AUTHORS AND PUBLISHERS, et al.	:	69 CIVIL 5740
	:	

New York, May 3, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM

vs. 69 Civil 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

May 3, 1973
10:00 a.m.

D O N A L D S I P E S, resumed.

CROSS EXAMINATION CONTINUED

BY MISS KEARSE:

Q Mr. Sipes, you testified, did you not, that you felt you would be unable to obtain licenses directly from writers and publishers unless you could offer them more than they would receive through their ASCAP and BMI distributions, is that correct?

THE COURT: Are you talking about under the present system or the proposed system?

MISS KEARSE: I am talking about any system under which Mr. Sipes would want to or would attempt to obtain direct licenses from writers and publishers.

A Well, I think I said that, Miss Kearse, in relation to a by-pass situation, a direct license without a a per use system. We are talking about a direct license under a by-pass. That would be my understanding.

Q Is that your understanding with respect to the

present system?

A The present system is a blanket license system. If I drop my license now and had no other system at all, then I guess I would be in what we have termed a by-pass situation, because I've got the blanket license and I am attempting to direct a license. That would be my understanding of the situation.

Q Suppose under the present system you were to approach writers and publishers directly and attempt to get a direct license?

A Yes?

Q Would you expect that to be feasible?

A Would I expect it to be feasible now if I dropped my license now? I'm under a system where I have a blanket license?

Q Under the present system.

A Under the present system.

Q Do you know what the present system is?

A I know that we have --

THE COURT: I think we are going to have to make up our own definition so we know what we are talking about. The present system allows him to have a blanket license, it allows him to have a per program license, and the question in my mind, Miss Kearse, when you use "the present system",

is, do you mean that he actually has a blanket license or merely that he is authorized to have one?

MISS KEARSE: Right.

Q Having the license that you have now, would you expect to be able to obtain licenses directly from writers and publishers?

A I would think I would not be able to obtain those licenses.

Q Not for any price?

A Well, perhaps if I paid an enormously prohibitive price. Any price -- I can't answer that question. I guess if I paid people gigantic, enormous sums of money, perhaps I could get some people to deal with me. I would think so, if I paid any price.

MR. HRUSKA: Your Honor, may I just register an objection? I think we are still suffering from a definitional problem because the defendant's counsel have been using the ~~phase~~ phrase "direct licensing," at some points as a substitute for another phrase we have been using which is "by-pass."

THE COURT: In some circumstances they are interchangeable. At least I understood the answers and the questions in the last series here seem to me simple enough ones. We knew what Miss Kearse was asking. She was asking

whether with the present blanket license Mr. Sipes thought he could get direct licenses.

I don't understand why that is relevant, because CBS has made it perfectly clear that even if they could they wouldn't be interested in doing it, since they are already paying for everything. But at least I understand that to be her question, and I understand Mr. Sipes' answer.

MR. HRUSKA: All right.

Q With respect to the possibility of obtaining options from writers and publishers, yesterday I believe you testified that you would not expect any significant publisher to make a deal with you unless you could do better by him than he would do under the system he is operating under. Is that correct?

A Yes, that is correct.

Q In the event that a per use license were granted to CTN, why would you expect any writer or publisher to deal with you directly for less than he would get if his composition were licensed to you through the per use license?

A Well, he would not have to. I mean he would not have to deal directly with me if he did not want to. If I follow your question, why would I expect him to, there may be situations in which the packager or the producer of a show feels that the particular use does not fit under

the use system. If the copyright owner felt the same way and if there was a chance for him to make a deal there which he would not get through the per use system, then he might be interested in making a deal with the other party.

THE COURT: I don't think you are talking about the same thing.

THE WITNESS: Then I am confused.

THE COURT: I think Miss Kearse is asking you with regard to material that would be covered by the per use license, would you expect that you would be able to make a better deal than the per use rate with anybody.

THE WITNESS: Well, as I said, your Honor, the person -- the copyright owner does not have to deal. Perhaps there could be a situation in which a packager or a producer of a show felt that two songs might fit into what he wanted to do and he said, "Listen, do you want to make a direct deal with me? I'll go for you."

I am trying to think of suppositions under which that could happen. And again --

THE COURT: Let's suppose that there is such a situation and that both of those songs are available to CBS on a per use basis from ASCAP and that the copyright proprietor knows that and he knows what you are going to pay on the per use basis.

Would you expect, as a packager, that it would be possible to negotiate with him for more favorable terms than those which ASCAP would charge you on a per use basis?

1B

THE WITNESS: For the packager?

THE COURT: Yes.

THE WITNESS: Yes, I think that is possible, sure.

THE COURT: Why do you think it is possible?

THE WITNESS: Because the packager could say, "Listen, I think this is the kind of number I'm thinking about doing," or "This is the kind of use I am going to be making in this particular show. I think song A, or composition A, B or C might fit your composition B."

THE COURT: But if the copyright owner knows that in order to secure that material the packager would, let us say, have to pay ASCAP a hundred dollars a song, is there any motivation for him to pay the packager $90 a song?

THE WITNESS: Sir, if I may, again, we are under a per use system?

THE COURT: Yes.

THE WITNESS: Under the per use system it is a hundred dollars for that use.

THE COURT: That's what I'm talking about.

THE WITNESS: Composition A, B or C fits the requisites of whatever use --

THE COURT: We would have to assume that or

there wouldn't be any discussion to begin with.

THE WITNESS: Okay. The packager can very well-- I'm supposing -- say to the copyright owner of song B, "Listen, I can use your song, or I could use A song or C song. Do you want to make a deal? Otherwise I'll take C song at a hundred bucks."

THE COURT: Now you've answered. In other words, you think you might be able to do this because you think you might be able to negotiate with the copyright owner by -- I won't use the word "threatening" --

THE WITNESS: That is not a threat.

THE COURT: Raising the possibility of using other material.

THE WITNESS: Right. If you don't want to make a deal, you don't make a deal. If you want to make a deal, you make a deal.

THE COURT: Now I understand.

BY MISS KEARSE:

Q Is it your judgment, then, that unless the copyright proprietor is prepared to go ~~it alone~~ below, the ceiling price in the per use system, then the packager would not use the composition?

A No, I can't say that, because that would depend upon the negotiation and what he is trying to

accomplish.

(Discussion off the record.)

MR. HRUSKA: May I ask that the question be read back so that Mr. Sipes can get the whole thing in context?

THE COURT: All right.

(Record read.)

A (Continuing) He may still decide that he wants to go with B song and pay the hundred dollars. Also, don't forget, B had the right previously to have pulled this song. He may have said at one point in time, "I want $300 for my song."

That doesn't mean that when the packager is going to go to that particular person he is going to accept the $300. He may or he may say, "Listen, I'll offer you $200 for your song." The guy may say, "No. I pulled. I want $300, and unless you pay me $300 I'm not going to make a deal."

The guy may say, "All right, I'll take your $300," or he may blow the deal. I can't answer as to what would happen in that situation. But those options are open, to make a deal or not make a deal.

Q We are talking about situations in which the composition has not been withdrawn from the scope of the

per use license.

A Okay.

Q Would the packager normally pay more than the per use price in order to get a direct license?

A Well, if it is under the per use system, Miss Kearse, and the man has not pulled his song, saying that he wants the higher price, then the packager would not pay the higher price in the per use system.

Q Dont you think it would be the same situation under a blanket license? In other words, a writer or publisher does not get a distribution unless his composition is performed, normally.

MR. HRUSKA: I object, your Honor. I don't think that is a proper question.

THE COURT: I don't understand what you mean by "proper."

MR. HRUSKA: In form.

THE COURT: May I hear it?

Q Is it your understanding that a writer or publisher only gets paid when his composition is performed?

THE COURT: Under the present system.

MISS KEARSE: Yes.

MR. HRUSKA: I object again.

THE COURT: Is the question what his understanding

is --

MISS KEARSE: Yes.

THE COURT: -- or what the facts are?

She is entitled to know what his understanding is.

MR. HRUSKA: I agree. But I object to the question on the grounds of form because it does not indicate paid by whom. The question is --

THE COURT: Let Mr. Sipes answer what his understanding is and then you can fill him in if he needs further information.

A If I may, I take it you are talking about a ~~BMI~~ BMI member under a blanket license. I pay a blanket fee and I just pay a total amount of money, and BMI pays out to their own members. Is that what you are talking about, Miss Kearse?

Q Yes.

A Well, I take it that he gets paid -- that there is a payout for performances to members. Now, whatever other plans there are inside BMI regarding how they pay off members regarding longeivity or -- in other words, what other plans there are within the BMI framework, I couldn't tell you. I don't know.

Q Assuming that a writer or publisher would only

be paid if his composition were performed, and assuming that we are talking about blanket licensing situations, would it be your expectation that you could obtain options from those writers and publishers for less than they would receive as BMI distribution?

A I don't understand. I don't understand the question, Miss Kearse. I really don't.

Q What part of it don't you understand?

A Well, I don't understand the question. Are you saying we are under a blanket license and the BMI member -- you are saying assume, and I don't know if it is true or not, but if I assume, that a BMI member through his own BMI system receives a payout, a flowout of money based upon the performances of his composition, right? Now what happens?

THE COURT: Let's not start all over again. It seems to me Miss Kearse's question wasn't that hard to understand. She said:

Assume what you do, as I gather, anyway, but do assume, that BMI members only get paid if their works are performed.

THE WITNESS: Right.

THE COURT: All right?

What was the second assumption?

MISS KEARSE: Assume that we are talking about a blanket licensing situation.

THE COURT: Yes. We are under the present blanket license system. Would you not expect that you might be able to enter into option deals with members of BMI under those circumstances?

Is that a fair version of your question?

MISS KEARSE: Yes, that's a fair version.

THE WITNESS: Well, again I am assuming --

MISS KEARSE: For less than the amount of the BMI distribution.

THE WITNESS: Again I am assuming that he is willing to deal with me, that he would be willing to make this deal with me. All right; assuming that. I cannot --

THE COURT: I don't think she is asking you to assume that. She is asking you what your opinion is, if they would do that.

THE WITNESS: My opinion is they would not do that, your Honor.

THE COURT: All right. Do you want to explain why?

THE WITNESS: My opinion is they would not do that.

2A

Q Why not?

A Well, to get back again to what we discussed before, one, I think they are operating under a system that they like and, going beyond that to the testimony I gave before, I don't know if we talked about this but I cannot -- if I make an option deal with a man to pay him on uses, I have got to say, "All right, I'll take an option on you and, at a particular point in time, I'll go into a use operation with you. In other words, you will get paid by use, right?"

I cannot guarantee that man any uses. I can't say to him that next year or two years from now or six months from now the ~~packages~~ programs of all these programs will be "Using your music, so that you get a payout from me."

He is the one to say, "Why should I enter into that arrangement with you, if you can't guarantee me the uses, unless you give me money up front, pay me for my taking that risk with you, to leave the system I am under now and go with you?" I have got to pay him for that.

I mean, that's my considered opinion.

Q What do you expect he would do if you guaranteed that his music would not be used unless he entered into an option deal with you?

A His music would not be used?

Q Yes.

A Music would not be used unless he entered in -- I would never do that, I would never offer that.

How could I offer that to anybody? I would threaten the man that nobody would use his music unless he entered into an option deal with me?

THE COURT: Not nobody; just CTN.

THE WITNESS: Well, sir, we don't do that.

THE COURT: In any event, you would probably want to see Mr. Hruska about it?

THE WITNESS: I wouldn't even want to see him. We just wouldn't do it.

Q What if the packager said to a writer, "It's a choice between your song or song B, and if you don't give me an option for less than the amount you would get in a BMI distribution, it's going to be song B, not your song"?

Do you expect that the writer would give you an option on that song?

A I can't answer it for packagers. I wouldn't dream of any packagers saying that, but how could I speak for them?

Q Let's assume that a packager would say that.

A Say that I am not going to use, threaten the guy? I don't understand it, Miss Kearse.

He would threaten this man that he won't use his song unless he takes less than he is going to get under -- why would the man be of a mind to do that? He would call up the head of BMI and say, "You know what that guy just said to me?"

If I were the guy that wrote the composition, if he is a BMI member, I would make a call to the president of BMI and tell him that.

Q But this is the type of statement that would be made to a writer or publisher under the per use system, isn't it?

A No.

Q Didn't you testify earlier that a packager would say to a writer or publisher under the per use system, "It's a choice between song A and song B"?

A Yes, it's like anything else -- if you want Sara Glutz toplay the role or Minnie Glutz. I'll tell you, "Sara, if you don't make a deal with me at $500 an episode, I may very well take Minnie at $450."

You know, whatever the -- so, you better make a deal with me, because I may go to Minnie. I mean, that's what we are saying.

I don't think that has any relationship, I don't think, Miss Kearse, to what we were just saying, before.

Q You don't think the same statement would be made with similar effect if you were attempting to get options to use music directly, instead of having that performance covered by the blanket license?

A No, not under the option system. Under the option system, I am saying, "Sir, would you please leave BMI and come with me; leave your system and I am going to guarantee you something to do that," right?

Isn't that what you are talking about? On an option basis, I am asking the man to leave the blanket license system, right?

Q You are asking him to give you an option to play hiscompositions for an amount less than he would receive from BMI.

A No, wait a minute. Wait. Wait. You said under the system we are operating under now, a blanket license system, why would I -- under a blanket license system, I would go to a man now and offer him an option at less money than he would be making under the BMI system and he would come with me?

Q That's the question. I am asking you that.

A The answer is absolutely not. My opinion is, I can't think of anyone who would, under those circumstances, say, "~~Sasa~~ SURE, I'll leave the BMI system and go with you because you are offering me less money."

THE COURT: Putting that aside, I am afraid, at least to me, it seems that we keep coming back under the blanket system to the same problem -- that is, you would never go out to get an option, anyway, because you have got a blanket license, isn't that right?

THE WITNESS: Absolutely.

THE COURT: I know she is entitled to ask the questions, but I wonder if they are not in relation to an academic proposition under the blanket license.

MISS KEARSE: Well, there was questioning and testimony with respect to the possibility of obtaining options with a view of reducing the scope of the blanket license.

THE COURT: Well, I understood and I know that we are getting in trouble from time to time by the interchange of terms, but what I understood we were talking about on those occasions had to do with a per program license and an attempted by-pass, rather than a blanket license and a by-pass.

I see people shaking their heads but then I must say that I simply cannot understand, and I certainly would have to hear powerful testimony to persuade me that a man who can do anything he wants without a further payment is going to experiment and pay more for the same purpose.

The per program license, I can understand, if the man is not quite sure, and I understood also, unless I am mistaken, under the ASCAP agreement that was put in evidence that the cost of the per program license can be ~~effected if~~ effected if the packager or producer already has command of some music. At least, I was led to believe that was the import of the second passage that we were discussing in the license, but I would like to hear observations of all counsel on this point, because I think it's a very important matter.

MR. TOPKIS: Since I asked the questions, could I take a minute or two to explain them?

At the same time, CBS and ASCAP are operating under an interim arrangement under the amended final judgment. Rates that they pay us are not fixed; they will be adjusted retroactively up, ultimately, to January 1, 1970.

THE COURT: In accordance with what?

MR. TOPKIS: If this Court orders a per use license retroactive to that date, perhaps that way. If this Court dismisses this complaint, we have told CBS that we feel that we are obligated to treat the letter that they wrote us on December 31, 1969, as an application under the amended final judgment.

In keeping with that attitude on our part, we

have applied to Judge Ryan for, and obtained, an interim fee arrangement, so it seems to us that the way that CBS and ASCAP have been and will be operating effective 1-1-70 is up in the air and --

THE COURT: It may be that it is up in the air or not, but that's a separate question, it seems to me, from what a man would do if he is on a blanket license basis.

MR. TOPKIS: But CBS is, today, on a blanket license at its own option and my questions were, being on a blanket license, why did you not obtain direct licenses and then go to Judge Ryan and, for the period starting January 1, 1970, say, "Our blanket rate should be lower because we held so many direct licenses."

THE COURT: I understood your questions and the answers to that. He said words to the effect that "I couldn't be sure Judge Ryan would agree with my theory," and that is still different from what I think the recent line of questioning as to what would happen without these peculiar permutations, which happen to exist at the moment would be, because of the existence of this litigation. At least I assume that the questions do not take those special circumstances into effect and I had thought Miss Kearse was asking about what would you do about trying to

get a license or what would you expect from people to whom you went for an option when you were under a blanket license agreement. My remarks expressed my own feeling that the defendants have a very heavy burden, not as a matter of law but as a matter of fact, to show what inducement a man who, under normal circumstances has complete blanket license for which he is going to pay an agreed or fixed fee, would be likely to go to the persons whose music he already has the license to perform to try and work out some further arrangements with him.

Now, I can understand and it's perfectly logical for you to ask questions about why, when the situation is up in the air, and you might be able to argue, as you suggested, if you don't try it. I am not disagreeing with that theory. I will have to conclude what is to be made of the questions and answers given, but I am trying to pull down to the ground what expectations or what the position of the defendants is.

I know what CBS's position is and I know I am expressing what CBS's position is, that if you have a blanket license, there is no incentive to seek a different kind of arrangement.

I would like to be sure that I understand what the defendants' position is on that point and whether

in Miss Kearse's questions she is now questioning Mr. Sipes for the purpose of trying to show that CBS's position and what I have said is not necessarily so.

MISS KEARSE: Well, my question, your Honor, is directed to questioning conducted by Mr. Hruska and referring to questioning starting at about page 133 of the transcript with respect to the possibility of by-passing ASCAP and BMI and the question was:

"Have you considered, Mr. Sipes, the following type of project as a means for paving the way to such a by-pass: what I mean is this -- one, seeking to amass a reservoir of music performance rights by purchasing options from music publishers; that is, options to use ~~of~~ the music in their catalogs ~~of~~ at stipulated fees, perhaps even per use fees, and, two, if you option enough music, exercising the option and then cancelling your ASCAP-BMI licenses?"

MR. HRUSKA: There is a typographical error there.

THE COURT: Please let her finish.

MISS KEARSE: Mr. Sipes testified that in his opinion that was not a workable alternative and he would have to pay publishers more than they would receive for performances under the present system, and I am trying to explore that.

THE COURT: Well, you are perfectly free to explore it.

I don't mean to say that you are not free to ask the questions that you are asking but I was trying to give you a reaction.

MISS KEARSE: It's a line of questioning introduced by CBS.

MR. HRUSKA: I wanted to point out, there is a typographical error on Page 133, Line 15. The last word on that line is "option," singular, and it should be "options," plural.

THE COURT: All right. Thank you.

Q Mr. Sipes, you testified yesterday with respect to your view as to what would happen if CTN took a per program license and in addition attempted to obtain licenses directly from writers and publishers, and your testimony included statements with respect to having to include in the budget of the program packagers a 9% figure, I believe, with respect to music performance rights, is that correct?

A Well, I think that my counsel assumed and told me to assume a 9% figure to be paid to each of the performance rights societies as the per program fee for that society.

I mean, that's my recollection of it.

Q Was that your only source for the ~~conclusion~~ inclusion of the 9% figure?

A Well, I think that was the figure in that stations -- per program stations per program license that was used as an illustration yesterday.

Q The local stations?

A The local stations, I think so.

THE COURT: Am I to understand, then, when you used the figure 9% you didn't mean necessarily that was a God-given figure but that was what you understood the charge was and you would have to include that payment for that charge?

THE WITNESS: Right, your Honor.

MR. TOPKIS: Excuse me, your Honor. There is no network television per program ASCAP fee. We have got a local station license that has a 9% charge in it, but there can't be any basis for anybody assuming that there is a 9% network fee.

THE COURT: That is why I tried to clarify it and I think I have clarified it. As I understand Mr. Sipes, yesterday, when he was talking about 9%, he was loosely using whatever the contract figure for a per program license might be between ASCAP and the person putting the show together. For a network, I assume that it would

be less than 9% but is there a figure?

THE WITNESS: I couldn't assume anything, your Honor.

MR. HRUSKA: There has been testimony on this, your Honor, but I won't bring it out now, as to what a network per program figure would be; not an actual figure, there has never been a network per program license for television.

Q I believe you testified, Mr. Sipes, unless you included in the packagers' budget a fee for music of at least 9%, that the packager would be in trouble, is that correct?

A That's correct. I think so, yes.

Q Is it your conclusion, then, that a writer or publisher would hold out for 9% as his fee for granting direct license?

A Well, Miss Kearse, I think what I was trying to say there was and I said, first of all, the 9% figure, my problem, even with 9%, and assuming it is "X" per cent. I don't want to -- I don't want to make it 9% but "X" per cent, that there would be an "X" per cent from one society and a "Y" per cent for the other society. If I just gave him "X" per cent, first of all, I may be forcing him to choose between one of the two societies. That is

Problem No. 1. Instead of giving "X" plus "Y" per cent.

But what I am also saying is that if he goes out and tries to clear his music and can't clear the music directly at the source, he must pay that per program fee to the performing rights society.

Therefore, if he doesn't have at least that money in his budget, he is going to be stuck because if he doesn't clear the music, he has to pay the performing rights society.

His other problem is that if he pays for one of the songs and then can't clear the others, he is not only out the "X" and "Y" per cent; he is out and -- he pays "X" and "Y" per cent, plus he is out whatever he paid for the song, if he paid anything for the song.

Q Let's assume we have a situation where a packager wants to film the program which has or which uses only background music, composed by one composer.

A Okay.

Q And he wants to get a license directly from that composer to use that music.

Is it your contention that that composer would hold out for 9% or "X" per cent, whatever the percentage is that you would have to pay under a per program license?

A Well, Miss Kearse, if I were the composer, I

would hold out for 8-1/2%, see, because the guy is going to have a half a per cent.

THE COURT: Slightly below?

THE WITNESS: Slightly below, right, your Honor.

A (Continuing) Sure, because otherwise he is going to have to pay the 9% to the society. "Give me 8-1/2; you are ahead a couple of bucks."

Q Don't you think that the composer would, in that situation, be risking that another composition would be substituted for his?

A Could be in the negotiation, never know.

Q Don't you think that is substantial risk he would take?

A It depends upon the composer, again. I couldn't answer you. That I can't answer you because that's a matter of negotiation.

Q Don't you think he would be willing to accept simply a little more than he would receive in a distribution from ASCAP or BMI, whichever he belonged to?

A No.

Q You think he would hold out for just slightly less than the entire amount that CTN would pay to the organization?

A Sure. Yes, I mean you are asking me to suppose

a situation and, yes, in the situation, I do suppose that.

THE COURT: Well, you are not -- you have been asked a general question, so you have given a general answer and there is nothing else you can do, but let me ask you -- would you think that Irving Berlin would hold out for slightly less than "X" per cent?

THE WITNESS: No. Slightly less than "X" -- in other words, slightly less than "X" per cent. He might say, "Give me the 'X' per cent or I'll give you a break, give me a dollar less, so instead of going to the society, you are paying me directly."

I would think he would be there or just below it, your Honor.

THE COURT: YOu can't think of any composer who would want more to deal with you directly?

THE WITNESS: More than you would pay for it per program? No, because again we are assuming that otherwise he is still a member of the society.

THE COURT: Or you can't think of any who would simply say that "X" per cent or nothing?

THE WITNESS: Oh, yes, but in those kinds of cases he can take the money somewhere else. He can say, "For the composition give me $73,000," or whatever. I don't want to use figures but you can slice it whatever way

you want to slice it. In this kind of situation, now, since the man is still a member of the society, he can't demand more than the payment that the society would take. The only thing he can do is take something slightly less than the society.

THE COURT: You mean he won't because you are not going to pay him.

THE WITNESS: Right, because then you pay the society and the society pays him.

Q Of course, you have never spoken with a composer about music performance rights, have you, Mr. Sipes?

A No, I have not.

Q So that your prior answer is based on your own speculation?

A My business judgment.

Q Your business judgment is not based on any conversations with composers, though, on the subject?

A I am in a blanket license, Miss Kearse. No, it isn't.

Q Mr. Sipes, does CTN contract for performance of band music played at football games?

A Contract for band music played at football games -- you mean the music performance rights of that music?

Q No. Does it contract to have music performed either as part of a package or otherwise?

A I think that there is -- I am trying to recall now. I think it is like, it may be a package, somebody delivers a half-time show or whatever, and these people, of course, would hire the bands and the majorettes and that kind of thing. I think.

Q You think CTN would enter into agreements with producers of half-time shows?

A I am trying to remember, Miss Kearse. Honestly, how a particular half-time situation is handled and as of the moment, I am not too sure whether our own guys go out and hire the people or whether we contract it out.

Q But there is, CTN would either go out and produce this half-time show itself or get someone to produce it, is that correct?

A I would think either one of the two propositions would be right, yes.

Q Would Mr. Horlik be better able than you to tell us about this?

A Well, Mr. Horlik is a member of the business affairs department. I don't know if Mr. Horlik, who is involved in many negotiations like all the other negotiators in the department, would know that or whether -- no,

I'll tell you, the person who would -- the person you would have to talk to or I would have to talk to is the, my business affairs guys in the sports department. That is a separate entity, the sports area, so it would really be the business affairs people involved with the sports area.

Q And what individual or individuals would that be?

A Well, there would be, I think the man to talk to probably would be Art Sekerak, who is the business affairs negotiator for sports.

Q Just so I understand you correctly, you did say that either CTN would produce the half-time programs or get someone or contract with someone?

A I think so, Miss Kearse.

Q So one way or another, CTN would be paying for the half-time programs?

A I think that ultimately, we would pay for it, yes, in one form or another.

Q Do you know whether when CTN gets the half-time programs through other producers, do you know whether CTN gets an indemnity such as the provisions that we referred to yesterday in BX-161?

A I told you then and I say now, I am pleading ignorance. I really don't look at those form contracts any more. I haven't for many years, and the negotiator in

that particular situation or the law department would be much more able to answer you on that.

MISS KEARSE: I suppose this is as good a time as any to reoffer BX-161 into evidence. Mr. Hruska stated yesterday that he had not had time to examine it.

THE COURT: Mr. Hruska? I forget what it is.

MISS KEARSE: It is excerpts from an agreement between the producer of the Ed Sullivan Show and CTN.

THE COURT: Which was originally attached to the motion --

MISS KEARSE: Yes.

MR. HRUSKA: Could I have a quick opportunity to scan that, your Honor? I will have to plead the fact that I did not read it over last night.

THE COURT: We will be taking a recess in a half-hour. Why don't you look at it then?

Q Mr. Sipes, assuming CTN's operation under a per use system, what would be your judgment as a business man as to the feasibility of a system in which all direct license agreements had to be on a per use basis?

A If I may, that every deal made for a composition would call for payments for each use of the music thereafter? Is that what you mean?

Q The payments made would vary according to use.

A Do I think it is feasible? Yes, I think it is feasible.

Q Do you think it is desirable?

A Yes, I think it is desirable.

Q With respect to our hypothetical per use system and with respect to compositions which have been withdrawn from coverage of the per use license, can you tell me whether a per use system would be of greater benefit to CTN than a simple direct licensing situation?

THE COURT: When you are talking of a per use system, do you mean a system in which per use licenses would be available from the licensing agency?

MISS KEARSE: Let me start over again.

Q In our per use situation hypothetical, there are some compositions which may be withdrawn from the coverage of the per use license. Now, dealing just with

those compositions, is there any way in which the per use system would be of greater benefit to CTN than a simple direct licensing situation?

A As to those programs that have been withdrawn?

Q Yes, those compositions.

A Well, those compositions -- I'm sorry. Am I supposed to speak now?

THE COURT: Yes.

A For those particular compositions that have been withdrawn, those in particular, the only way to get those compositions, if you want them, is to directly license them with the copyright proprietor. Right? Because he has withdrawn them. You say you want to make a deal for that composition. "You come and talk to Mr. 'X' that represents me and let's see if we can come to terms.""I want 'X' number of dollars," whatever. You have a negotiation.

So you are attempting to directly license for those, but you still have your per use system working. So for those particular items that have been withdrawn you are directly licensing.

Q So for those particular items you would be no better off under the per use system than under a simple direct licensing situation?

A When you say "a simple direct licensing system," you are much better off because you have a per use system working, so that anybody who wants to withdraw from that can withdraw and can deal. I think it is a totally different situation than a by-pass, a direct license; it is another world.

Q Your answer is really not responsive --

A I think it is.

Q -- because we are talking about compositions which have been withdrawn from --

A For those particular compositions that have been withdrawn, you are directly licensing those particular compositions as you would be attempting to directly license any other composition under a direct license approach.

Q So, with respect to those compositions, there would be no difference as far as CTN is concerned whether it had a per use license for other compositions or whether it had no license for other compositions?

A No. But those people are willing to deal with you. They have put you on notice that they are willing to deal, that there is a man ready to deal for those withdrawn compositions. You can sit down and make a deal.

Don't forget I have also said that I think

there would be a lot of unwillingness to deal with me if I attempted to by-pass. Here the man is saying, "All right, I'm pulling my song. I don't think it is worth what the per use system rate is for whatever the use is. I withdraw that. I want more money. Come on. Let's talk. But I want to make a deal with you if I can."

Q Then is the benefit that CTN would get from having the per use structure the name and address of a person he could deal with directly, name and address of a person CTN could deal with directly?

A When the man withdraws?

Q Yes. We are talking about the compositions that have been withdrawn from coverage of the per use license.

A The man withdraws because he thinks that the song is worth more than is provided for under the per use system, the schedule. That is why he is withdrawing. He is not withdrawing because he thinks it is worthless. He is withdrawing it because he thinks it is worth more.

Q You haven't answered my question.

A Let me finish. I haven't finished.

THE COURT: I may be wrong, but I didn't understand CBS to say that they would benefit by a withdrawal but simply that a withdrawal is something which they believe would have to be part of the structure.

A Right. And the man would be withdrawing for more money, but because of that he would have somebody negotiate a deal with him.

THE COURT: I suppose one could theorize a situation in which a starving composer would withdraw from the licensing agency and go to CBS and say, "Pay me anything."

MISS KEARSE: My question relates to those compositions which would not be covered by the per use license, and my question is whether CTN thinks that as to those compositions it would be better off under the system it proposes than if there were no license.

THE COURT: There were no license?

MISS KEARSE: No license.

MR. HRUSKA: I object to the question. I think it calls for an answer which, if given, would be irrelevant to this case.

MISS KEARSE: I beg your pardon?

THE COURT. Well, there are so many possibilities, I am willing to hear.

Do you want the question read to you again?

THE WITNESS: No, your Honor.

A (Continuing) I am going to grope a little, but yes, I still think I am better off because I know who to

go and make a deal with. You know, I've got to make a deal, I've got to negotiate, and the guy may hold out for a price that I won't pay, or I may offer him something that he won't take, but I can get into a negotiation very quickly.

Q Mr. Sipes, do you think it would be feasible to have a per use system in which there would be no fixing of rates or schedule of rates by the Court?

A I missed the beginning of your question, if I may have it repeated.

(Question read.)

A Well, let me say that I think that knowing that the Court is standing by to fix rates will help the parties set the rates themselves.

THE COURT: Why do you think that?

THE WITNESS: Because I think, your Honor, that in that situation, speaking for myself, maybe I shouldn't speak for other people, that the people who are making the deal together would still have control, more control of making the deal before the Court stepped in. But knowing that the Court was there would help us all make it happen, and we would still have more control over those rates, et cetera, by that I mean both sides of the table, than having a third party do it for us.

THE COURT: You don't think it would be possible that knowing that a Court was there to set the fee you might hold back your last nickel or dime until you got before the Court?

THE WITNESS: No, sir, I don't, no. I think that it would ~~impel~~ compel the parties to still try to control the situation themselves.

THE COURT: Then what is the Court needed for?

THE WITNESS: I think the Court is needed so that there is no reluctance not to come together, because I think otherwise you may have a situation --

THE COURT: Wouldn't there be even more force to come together if the Court wasn't there? What would you do if you didn't reach a deal and there was nobody to go to?

THE WITNESS: Well, if one side of the fence was not willing at all, didn't want it to happen at all, it would go on forever that way, unless there was a feeling that you had better come together, fellows, because the two of you together will still control the situation before the Court gets into it.

Q Mr. Sipes, yesterday, we were discussing conversations that you had in 1969 with BMI. During those conversations, did you ever discuss the possibility

of a BMI per program license for CTN?

A I really don't recall, Miss Kearse. I don't.

Q Did you ever ask BMI to quote you a rate for a per program license?

A I don't think so. I don't think so. But I'm not sure.

Q You are not sure. You think you might have?

A No. I think I might have not. I think it goes the other way. I'm not sure. I don't remember. But I don't think I did.

Q Did you ever ask ASCAP to quote you a rate for a per program license?

A I would give the same answer there. In fact, in that meeting I had with ASCAP, the answer is no. That I remember, because I said not very much. So, the answer would be I did not ask ASCAP.

Q Mr. Sipes, a form of per program license for local television stations has been introduced. Did you ever see such a form prior to the start of the suit?

A I don't think I did.

Q Did you ever see such a form prior to the date of Mr. Woods' letter, which has been marked as PX-200?

A I don't think so, Miss Kearse. Again, I really can't recall, but I don't think so.

Q Did you ever see a form of BMI per program license?

A For what?

Q For anything.

A For anything? Not that I can recall. I don't think so.

THE COURT: Do you deal or ~~did you~~ did you during this period of time deal at the local station?

THE WITNESS: No, sir. That's not my responsibility. Network only. Television network only.

Q Did you ever see PX-261 prior to your preparation for testimony in this case?

A What is PX-261?

Q I'm sorry. That should be No. 231.

THE COURT: That is the local license we have been talking about?

MISS KEARSE: That is the local license.

A I don't think so. I don't know for sure, but I don't think so.

Q In fact, you testified at your deposition that you really are not familiar with per program licensing at all, didn't you?

A I don't remember what I said in the deposition on that particular point, Miss Kearse.

Q Well, is that the fact, that you are not familiar with per program licensing?

A We have been operating under a blanket license all the time I have been in the network. Of course I'm not familiar with per program licensing. We have no per program licensing. By "we," I mean CTN. I can only speak for the television network.

THE COURT: I am sure you have things to do back at CTN. If you just answer a question like that, "Yes," you will get back quicker and we will all save money and time.

Q Mr. Sipes, I believe you stated in answer to questioning which Mr. Hruska made that you had requested that meeting with BMI during 1969 that BMI grant the per use license. Do you recall that?

A Yes. I said my recollection was that, yes.

Q Do you recall approximately when that meeting occurred?

A No. It was during the series of meetings that I had with Mr. Cramer. I can't remember exactly when.

THE COURT: During the series of meetings that you had with Mr. Cramer in 1969?

THE WITNESS: 1969, your Honor.

THE COURT: You did ask for a per use license?

THE WITNESS: I said that, yes. My recollection was that at one point I asked for a per use license.

THE COURT: Okay.

Q Was anyone else present when you asked for a per use license?

A I must also say I don't remember. I mean, Mr. Cramer was there. I don't remember who else.

Q You testified yesterday that Mr. Appel attended some of your meetings with Mr. Cramer. Was Mr.Appel present when you asked Mr. Cramer for a per use license?

A I'm not sure, but I don't think so.

Q You were informed, were you not, in the fall of 1969 that BMI had sent a notice of termination of CTN's license, is that correct?

A The television network license? Yes, I think I was informed then.

Q Was the meeting in which you requested a per use license from Mr. Cramer before or after BMI sent its notice of termination?

A I can't remember, Miss Kearse. I don't recall.

Q Do you recall whether you had any meetings with Mr. Cramer after BMI sent its notice of termination?

A I don't remember that either.

Q Who made the decision, Mr. Sipes, that you would ask Mr. Cramer if BMI would grant a per use license?

A Who made the decision for me to ask him? I made the decision for me to ask him.

Q Did anyone else participate in that decision?

A I really don't -- I don't know who participated in it. I asked -- my recollection is that I asked Mr. Cramer for a per use license. I made that decision to ask him for that.

THE COURT: Was this a spontaenous thing?

THE WITNESS: No. I'd been thinking about this thing, your Honor.

THE COURT: I think Miss Kearse is interested in, and I am interested in, whether you discussed it with anybody as a matter of company policy.

THE WITNESS: No, there was no company policy in that sense.

THE COURT: I'm not saying that you weren't free to perhaps articulate company policy. But there were no round-table discussions at CBS about whether to ask for a per use license?

THE WITNESS: As I recall, no, your Honor. It wasn't that kind of situation.

THE COURT: If there was a big meeting, would you have recalled it?

THE WITNESS: If there was a big meeting like that, I think I would recall.

Q Do you recall discussing it with anyone prior

to making that inquiry of Mr. Cramer?

A I would have to give you the same answer, Miss Kearse. I do not. I do not recall.

Q You do not recall.

A No.

Q Do you recall discussing with anyone afterwards that you had made that request of Mr. Cramer?

A I can't recall now, no. I don't know.

Q Mr. Appel attended some of those meetings with you. Did you keep him informed of what went on at meetings he did not attend?

A Generally, but not always.

Q Well, do you recall whether or not you told Mr. Appel that you had made this request of Mr. Cramer?

A I can't recall, Miss Kearse.

Q Did you write any memorandum to the effect that you had made that request of Mr. Cramer?

A I do not believe so.

Q Did you regard it as a significant request?

A I regarded it as a significant request? I would have liked to have gotten a yes from Mr. Cramer.

Q Just answer the question yes or no, please.

A Well, I don't know what "significant" means. I mean I don't know.

Q You don't know what "significant" means?

A No. What do you mean by "a significant request"? As distinguished from what?

THE COURT: From an insignificant request.

THE WITNESS: Well, I don't know. I made a request of Mr. Cramer.

Q Just a casual request?

THE COURT: Would it be fair to say that you regarded it as a serious request?

THE WITNESS: Yes, sir.

Q Did CTN genuinely want a per use license at the time you made that request?

A Yes.

Q Did it want a per use license from ASCAP also?

A It would have.

Q At that time?

A It would have liked one, yes, sir.

Q Did it ever make a request of ASCAP for a per use license at that time?

A Prior to the ~~letter~~ letter of Mr. Wood's, you mean?

Q Prior to the letter from Mr. Wood.

A No, it did not.

Q What was Mr. Cramer's response to that request?

A As I recall, his response was that he wouldn't

go that way with me unless I got that from ASCAP first.

Q Did you tell him you had not made that request of ASCAP?

A No, I didn't tell him I had not made that request of ASCAP. I don't think I said that to him.

Q Can you remember how long prior to Mr. Wood's letter this meeting took place?

A No, Miss Kearse. I cannot.

Q Prior to the sending of Mr. Wood's letter, did you tell anyone at CTN about your request of BMI?

A I can't recall now.

Q Did you tell Mr. Wood?

A I'm not sure. I may have discussed that with him at the time we were making our recommendation regarding per use. I think I might have, but I'm just not sure.

Q Did you tell anyone of your request prior to the summer of 1970?

A Miss Kearse, I don't know.

Q Do you recall when the first time that you mentioned this request to anyone was?

A I don't.

Q When is the first time you recall that you mentioned this request?

A I don't recall, Miss Kearse.

Q Do you recall mentioning it to anyone prior to your deposition in this case?

A I don't recall.

Q Now, when you asked Mr. Cramer for a per use license, what did you say to him?

A What did I say to him? I can't remember the exact words. I said, generally, "Why don't you people enter into a per use arrangement with us? Your claim is that your music is the one that is expanding, growing and becoming more popular all the time, and perhaps this is a way for you to achieve more, because you are saying your music is used more. A per use arrangement would be the right way to go for you."

Q Did you use the term "per use" to him?

A I think I did use the term, or "use." I am not sure of ~~sureof~~ the exact term, but it was a per use type of arrangement.

Q Did you explain to him what you meant by a per use type of arrangement?

A I never got -- as far as I can recollect, we never got that far. He didn't want to go into that, saying to me what he said about he wouldn't go that route with me unless ASCAP went that route first. We never got into any kind of real discussion of it.

THE COURT: How long would you say this discussion with regard to the possibility of getting a license based on use took?

THE WITNESS: Three minutes, your Honor, in the context of the conversation.

Q And your testimony is that Mr.Cramer said that BMI would not give you a per use license unless ASCAP did, and and that was before you even explained to him what it meant?

A Well, we all knew what we were talking about. We would pay for music on use.

Q We've been in this lawsuit three and a half years, and what we mean by per use license has been changing all the time.

You did not explain to Mr. Cramer what you meant by a per use license, is that correct?

That's correct, except that he knew that I meant that we would pay for music as used.

Q Did you say that to him?

A I can't recall the exact words, Miss Kearse. I said that.

Q Well, I'm trying to find out what you said to him as opposed to what you are telling me you think he knew.

A I said -- I think I just said that I talked to

Mr. Cramer about: Since you people are saying that your music -- your music has been growing and that it is being used more and more, wouldn't it be advantageous to you to go into a per use arrangement with us, an arrangement whereby you would get paid by the use of the music, so that the more BMI music that was used the more money would come to BMI?"

Q Did you suggest that different rates would be set according to different usages of music?

A Miss Kearse, I told you, as I just said, that conversation took about three minutes. He cut me off right away and didn't want to get into it. No, we did not get into any of the details. We didn't get into anything besides that approach and the turndown.

MISS KEARSE: Your Honor, I think I am about finished. Would this be a good time to take a break?

THE COURT: All right, a ten-minute recess.

(Recess.)

MISS KEARSE: Your Honor, I haveno further questions of Mr. Sipes.

THE COURT: Thank you.

Mr. Hruska?

MR. HRUSKA: Your Honor, I just have one question.

THE COURT: Did you say just one?

MR. HRUSKA: Yes, sir.

THE COURT: It happens in every trial, doesn't it?

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Sipes, at page 309 and 310 of the transcript of yesterday afternoon's session you were asked these series of questions and gave these answers, starting at line 15:

"Q Mr. Sipes, in answer to a question by Mr. Topkis I believe you stated that under a per use system you would expect program packagers to come to CTN already having acquired performing rights to music; is that correct?

"A Well, I think I said that I would expect packagers who were delivering programs to me to deliver with those programs all elements, including music performance rights.

"Q Have you ever discussed this expectation with the program packager?

"A A program packager?

"Q Yes.

"A No, not that I can recall."

Do you have anything to add to that answer, Mr. Sipes?

A Yes. On reflection after I left the stand yesterday and thinking about it, I had discussed this with a couple

of producers. I had made an artificial distinction between a program packager and a producer, and I would like to clear that up now and say yes, I had discussed this.

THE COURT: But when you say you discussed this, you mean the per program concept?

THE WITNESS: Per use concept.

THE COURT: Yes, the per use concept.

THE WITNESS: And the budgets for shows under that eventuality, yes, sir.

THE COURT: Thank you.

MR. HRUSKA: No further questions.

MR. TOPKIS: I have a few more and I will not suggest that they were inspired by Miss Kearse's questions, but by overnight thinking and I had designated Mr. Sipes as one of my witnesses and I don't want to call him back, unnecessarily.

THE COURT: All right.

MR. HRUSKA: I would object to this procedure.

THE COURT: Being called as his witness?

MR. HRUSKA: No. Simply to have further cross-examination by Mr. Topkis.

THE COURT: Is this cross-examination or your own examination?

MR. TOPKIS: Yes, sir.

THE COURT: I am a little unclear. I thought you said it rose as a result of reflection but that it had to do with material that you would have called him for as your witness.

MR. TOPKIS: I said I wouldn't represent to the Court. I am not sure on exactly which side of the line it will fall.

THE COURT: Let's hear the questions.

FURTHER EXAMINATION

BY MR. TOPKIS:

Q Mr. Sipes, you told us on your direct testimony that it is the business of the Columbia Television Network to acquire programs from independent packagers, typically, and transmit them to your local affiliates for broadcasting.

In broad terms, that is what you said your business was, right?

A To those stations that would accept the program.

Q And you have something that is referred to in the trade as an affiliation contract with your local affiliates, is that right?

A That's right.

Q And am I right in believing that under your form affiliation contract you pass on to the affiliate

one-half of your total music costs?

MR. HRUSKA: I object to the form of the question, your Honor. I think it calls for a legal conclusion.

MR. TOPKIS: I am askin him to summarize --

THE COURT: Do you know what the proportion of your costs is that you pass on?

THE WITNESS: Sir, that area is not within my bailiwick.

THE COURT: Does that mean no?

THE WITNESS: I know that there is a passing on of a percentage. I think it's one-half but that, again, I am not sure of.

Q Let us assume for the moment that it is one-half under your form contract and I don't think there is any doubt about it -- have you given consideration to how, under a per use licensing system where you told us that one of the factors to be considered in determining the per use fee would be the number of stations broadcasting a particular program, how would you pass on to the local stations their appropriate share of the music cost?

A I think that we would have to make some different type of arrangement with the stations. What that is, I couldn't say now.

Q Would you agree with me that it would be a relatively complex job?

A I could not agree with you because I don't know.

Q You testified that music is the only element of a program which you purchase on other than a per use basis.

Do you remember that testimony?

A I think I said that I bought on an as needed basis, and isn't that what I said? I am not sure.

Q All right. Whatever it is.

Actually, isn't it the fact that you also buy news from the AP and UPI on a blanket basis?

A That's the News Division, Mr. Topkis, and it has nothing to do with the television network. I don't know.

THE COURT: You mean you weren't talking about that when you said what you said?

THE WITNESS: That's right, sir. That's not an element of a television entertainment program on the network.

Q In any event, when you acquire music performance rights, you acquire non-exclusive performance rights, do you not?

A Under the system we have now, you mean?

Q Or under the per use system or under any system.

A I would think it would be non-exclusive performance rights.

Q In acquiring every other program element with the exception of music and news, you acquire exclusive rights, do you not?

A For that particular -- well, no, that's not true. You may hire a cast for that performance. Of course, they are exclusive, but that doesn't mean the next day they are not on another program.

Q I understand that.

A Then, for that particular show, you would get that, as you would -- your music would appear on that particular show, too. I may not be seeing the exact distinction you are making and I'm sorry.

Q The distinction that I am suggesting to you is that, although a composition, turn it around, if I may -- that when you acquire a program, you acquire it exclusively; you don't want to see the same program turn up on ABC or NBC.

A It may later on.

Q By arrangement with you?

A No. I only buy a license for a program, for a network return or two or three returns. It can turn up on

on a syndicated basis on any channel in any town after the network runs are over.

Q After the network runs are over and after your term of exclusivity is over?

A Correct. For the network, right.

Q Now, you filed an affidavit in this proceeding, Mr. Sipes, dated July 7, 1970. You recall that, don't you?

A Yes, I did.

Q You annexed to that affidavit an affidavit by Mr. ~~Robbert~~ Robert H. Precht. Do you recall that?

A I don't recall it, but if it's there it's there.

Q And you said in your affidavit that Mr. Precht was the producer of the Ed Sullivan show. Do you remember that?

A Yes, he was.

Q And in his affidavit, Mr. Precht recites that the Ed Sullivan show, and his affidavit is dated in July of 1970, the Ed Sullivan show is the only live variety program telecast by CTN. That was true at the time, isn't that right?

A As I told you yesterday. I don't remember. I told you that the show is a very old show, the Ed Sullivan show, and for many,, many years it was live.

At a point in time it --

THE COURT: Just a minute. Is the point that you are trying to bring out that it was live when nothing else was?

MR. TOPKIS: It was live at the time.

A In 1970?

Q Yes. That's what he says.

A To be honest, I don't remember. I wouldn't know. I mean, we could find it out.

Q You wouldn't challenge Mr. Precht's statement?

A No, unless he, at that time, as I told you -- a lot of times you say live and it's live on tape, you know, and I am just not sure in that particular year how that show operated.

I am not trying to tell you that I know. I don't know.

Q Well, he says, as of June 30, 1970, it's live.

A Okay.

Q And he goes on to say that the commercial success of the program depends in large part on its ability to bring to the screen week after week performing artists and music representative of the most popular recent trends in entertainment in this country.

Would you agree with that statement as a fair

description of one of the elements of the success of the Ed Sullivan show?

A Well, if Mr. Precht says so it must be. He was the producer of the show.

Q And Mr. Precht went on to say that, describing the way the show was produced week after week, generally, "My staff will contact an entertainer or his manager or agent two weeks before telecast and discuss the music to be performed. Sometimes the entertainer will send to us a recording of the music he or she would like to perform and we determine its suitability for the program. When the performer is unable to send a recording or we have not previously seen him in performance, we may not hear him perform the song until some time during the week before the telecast in a rehearsal hall."

Does that conform with your recollection of the way the show was done?

A I can't recollect the way the Ed Sullivan show was done then, but if Mr. Precht is saying that, then he would know.

THE COURT: Mr. Topkis, I am bothered by these questions for a couple of reasons. In the first place, it seems to me they go far beyond Miss Kearse's cross-examination, which you admitted that they were not related

to but that they apparently open areas we haven't explc
before, and that's perfectly all right.

MR. TOPKIS: Yes, sir.

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THE COURT: The other bother is that Mr. Sip
really doesn't seem to be the man to give us any meanin
information on this.

I know that Mr. Sipes says he has great con-
fidence in Mr. Precht and he has, if Mr. Precht says i
so, it's so, but on that basis you might just as well o
the affidavit in evidence for whatever it's worth.

MR. TOPKIS: All right. That would be simpl

THE COURT: Either that or call Mr. Precht.

MR. TOPKIS: Then we can excuse Mr. Sipes.
I would, however, offer only a portion of the affidavit

THE COURT: Subject to Mr. Hruska's taking
whatever action he wants.

MR. TOPKIS: I will do that at another time.

MISS KEARSE: I have one or two more questio
of Mr. Sipes.

FURTHER EXAMINATION

BY MISS KEARSE:

Q You stated that after you left the stand yes
day it occurred to you that you had discussed the questi
of packagers delivering a complete program, including

music performance rights, with a couple of producers.

Before that occurred to you, did you have conversation with your counsel?

A No. After I left the stand, I said to myself, "Well, somebody asked me about program packagers, and I said, 'Do you mean program packagers,' and the answer was 'Yes.' And I said, 'No,' with program packagers I didn't.

But I thought afterwards, after I left the stand and thought about it, that I was making, as I said, a rather artificial distinction and I was being technical and I didn't want to be cute.

Producers, in instances, are not the program packager. The terms are a little vague. Sometimes when you say "I talked to producers," you really mean program packagers, but if you are saying program packagers, you can sometimes say that this man is a producer and technically he was a packager, and I didn't want to get into that.

I said, yes, I talked to a couple of producers.

Q Who were the producers you talked to?

A I talked to Bob Wright and George Sunga.

Q When did you speak to them on this subject?

A Well, this has been -- it would have been within

the last six to eight weeks, somewhere in there.

Q But not --

A Within the last eight weeks or so.

Q But not prior to that time?

A No.

Q Have you ever spoken to any other producers this subject?

A Well, now, let me make sure this time.

No, I think those are the only two producers I have spoken to about this particular situation.

THE COURT: Hasn't the publicity of this suit such as it has been, engendered interest of a kind that would stimulate people to ask you what it's all about?

THE WITNESS: Well, your Honor, I don't know one, how big the publicity has been.

THE COURT: I know it hasn't been so big but there has been some in Variety.

THE WITNESS: California right now is in the throws of a writers' strike that is tearing the place up.

THE COURT: I didn't mean now, but over a period of several years.

THE WITNESS: No, your Honor. They have their problems. They keep producing shows and running around trying to get talent and now they are in the throws of the writers' strike and they are all going crazy out there.

Q Have you spoken to Mr. Wright or Mr. Sunga on the subject within the past week?

MR. HRUSKA: Could we have the subject defined with somewhat more clarity?

THE COURT: Per use contract, I understand.

MISS KEARSE: The testimony we are referring to is the testimony yesterday that he would expect program packagers to come to CTN with all the music rights cleared as part of the package.

MR. HRUSKA: This is the problem. Are we talking about the broad concept or the specific area?

THE COURT: Let's ask either.

Have you talked about per use concept or the fact that under a per use system you would expect the

packager or producer to come to you with music performance rights assured?

Have you discussed either of these matters with them, or either of them in the last week?

THE WITNESS: The broad concept, your Honor, yes, I have. The other part of your question, within the past week, no.

Q How about within the past two weeks?

A No. I think it is more than that, Miss Kearse.

Q When you spoke to Mr. Wright with respect to program packagers bringing music performance rights, was this a conversation in person?

A With him? Yes.

Q Where did it take place?

A It took place in the law firm of Cravath, Swaine & Moore.

THE COURT: Who is Mr. Wright?

THE WITNESS: Bob Wright is the producer of the Carol Burnett Show.

Q Was Mr. Sunga there at the same time?

A No.

Q Where did your conversation with Mr. Sunga take place?

A The same place.

Q Was that prior to your conversation with Mr. Wright?

A Well, let me see -- I am trying to think. Perhaps it was.

Q Who is Mr. Sunga?

A Mr. Sunga is also a producer, has produced various specials, among them the ninety-minute special we had on several weeks ago, the name of which has just escaped me, but he is a musical variety producer.

Q Have you had conversations with either Mr. Sunga or Mr. Wright on this subject of ~~factors~~ packagers bringing music performance rights already ~~clearned~~ cleared other than at the offices of Cravath, Swaine & Moore?

A I think I may have talked to them on the telephone also. You know, from New York to California or in New York, or wherever, but I have talked to them on the telephone.

Q You think you may have talked to both of them on the telephone?

A Yes, I think so.

Q Are they both located in California?

A Yes.

Q Did you speak with them on the telephone on the subject prior to meeting with them at Cravath, Swaine

Moore?

A My recollection is that I did, yes.

Q How long before that meeting?

A Well, I can't tell you exactly. Within seve weeks of the meeting. I am talking about a period tha only goes back a couple of months, so it has to be wit that framework that I am talking about.

MISS KEARSE: I have no further questions.

THE COURT: I have one question.

Have you discussed this with Clay Whitehead

THE WITNESS: He and I don't speak much, your Honor. That's another problem.

THE COURT: Do you have any further questions

MR. HRUSKA: No, your Honor, we do not.

MR. TOPKIS: Your Honor, before the witness is excused, Mr. Sipes undertook a couple of assignments at my request yesterday, you recall.

First, he was to endeavor to find out what portion of the hundred-million-dollar-plus inventory in the can has been acquired since January 1, 1970, and I wonder whether he has done so.

THE WITNESS: Well, there are people working on that, Mr. Topkis. If you want, I can give you perhaps a rough guess which we could refine, but there are peop

working on it.

THE COURT: Let's get the information that is more refined. Let's wait for that.

MR. TOPKIS: Is the same true of your effort to count the number of CTN programs which would --

THE WITNESS: By that you mean series programs?

MR. TOPKIS: Yes.

THE WITNESS: For what year?

MR. TOPKIS: You remember, you gave us an estimate of 3,600 separate episodes.

THE WITNESS: Separate episodes and specials. And specials would have to count also as separate programs, but you want, then, what particular year?

MR. TOPKIS: Let's say 1972.

THE COURT: Do it for the years in which the 3,600 figure applies.

THE WITESS: That was an avarage kind of figure. '72-3?

MR. TOPKIS: Fine.

THE WITNESS: Series, specials and pictures, right?

MR. TOPKIS: Right.

THE WITNESS: Motion pictures and pictures for TV.

MR. TOPKIS: Yes.

THE COURT: Thank you very much, Mr. Sipes.

(Witness excused.)

MR HRUSKA: I would, at this time, like to call to the stand Robert Wright.

R O B E R T B. W R I G H T, called as a witness by the plaintiff, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Could you state your address for the record, Mr. Wright?

A Yes. I live at 48 Empty Saddle Road -- don't laugh -- Rolling Hills Estates, California.

Q You have already been identified, but let me just ask you for the record to do it yourself.

What is your present position?

A I am the associate producer of the Carol Burnett television show for CBS and I am a vice-president of Bob Banner Associates, Incorporated.

Q Now, with respect to the Carol Burnett show that you do, what basically are your responsibilities in that job?

A As associate producer I am kind of the right

hand of the executive producer. It is my job to see that the budgets are organized, estimated, adhered to; that the scheduling of the show is done on time and tightly that all production elements are functioning properly and that all problems are solved.

THE COURT: What does the executive vice-president do?

THE WITNESS: He tells me to keep things going.

Q Is that the kind of job which is generally referred to as an on-line producer, just to get our terminology straight?

A You could call it that, yes.

Q Who is the packager of the Carol Burnett show?

A The packager is Punkin Productions.

Q And is that a so-called independent packager?

A Yes. It is a company that is formed for the special purpose of producing the Carol Burnett Show.

Q Could you outline your experience in the entertainment industry, Mr. Wright?

A I graduated in 1949 from Northwestern University School of Speech, majored in theater and television.

I received my first job in the industry in New York the following year with Fred Waring organization I was at that time a performer.

I was with Mr. Waring for several years, tw[illegible] three. I also worked with Perry Como in those early [illegible] with Max Liebman, The Show of Shows, the Max Liebman [illegible] Sid Caeser Hour, the Martha Raye Show, various other commerical recordings and soap operas.

THE COURT: Were you in a producing capacit[illegible]

THE WITNESS: I was at that time a performe[illegible] your Honor.

THE COURT: As a matter of curiosity, what [illegible] your line of work?

THE WITNESS: I was a singer and a part-tim[illegible] actor.

A (Continuing) In 1954, I believe it was, or [illegible]55, I was able to get back to what I wanted to do, which was production. I had an opportunity to join Dancer [illegible]-gerald Sample Advertising Agency as a producer, or at least I wasn't a full producer then, I am sorry -- as [illegible] assistant in the television, live producing wing of t[illegible] agency and the radio recording commercials, jingles [illegible] so forth, from the other side now of the microphone, since music was part of my background.

I was with DFS for about two and a half yea[illegible] and then, in 1957, Bob Banner --

THE COURT: How do you spell his name?

A B-a-n-n-e-r.

Bob was, at that time, producer of the Dinah Shore series in California, the variety show, and he ha been my mentor, more or less, at college. He was an associate professor at that time and he introduced television to the curriculum of Northwestern in the late '40's and I became very interested in it at that time.

Bob formed his organization, Bob Banner Assoc in that year, and the following spring -- I am sorry, the following fall -- came to New York at the behest of Mr. Mike Dann, who was at that time the nighttime vice-president for television programming for CTN.

The purpose in bringing Bob and his organizat n back to New York was to take over the production reins of the Garry Moore Variety Show, which was in a little bit of trouble after five shows. They went from a rati g of 55 to 17, so the network was concerned.

At that time Bob came to me and said, "Why don't you join the organization? We can use you and become our fourth associate?" The other two at that ti were Mr. Joe Hamilton who is now the executive producer of the Burnett Show and Mr. Julio Di Benedetto, another one of our old friends, who has since deceased.

I said, "Great."

We started work on the Garry Moore Show and that show was on the air about six years, six seasons.

Along the way, we put on a permanent contract a young lady named Carol Burnett and a group of people headed by Allen Funt, known as Candid Camera, and as I am sure you remember, your Honor, Candid Camera was a spin-off in essence. It became a program of its own which our company produced, co-produced, with Allen's company. Carol, essentially, it was obvious, she was a major talent and entered into a long-term contract with CBS.

We were a part of that contract. Part of the deal was generally that we would produce anything that she did on the network and that she was more or less exclusive to the network, and that was a ten-year deal.

MR. TOPKIS: Excuse me, your Honor. I am a little lost as to who the "we" is.

THE WITNESS: Bob Banner Associates, our company.

A (Continuing) At that time, then, after the Moore show was cancelled, Carol's deal continued and we continued to do specials with Carol Burnett, one a year until the fifth year of her contract, which called for her to make a decision about doing a weekly series. And she could either go into a sit-com situation, weekly thirty-minute show, or have a variety format, whatever the network and she decided mutually.

Well, variety was her home base, she was at home in it, and that's what she decided to do in 1967.

Now, in the interim we also worked with Carol on a 24-week series called The Entertainers, which starred Carol Burnett, Bob Newhart, Katrina Valenti. She was - I'm sorry. I was associate producer also of that series.

We had along all of this time, we produced, several other specials and series, the Jimmy Dean Show, which I was not a part of but my company was; I mentioned Candid Camera. We had a series called Diagnosis Unknown as a summer replacement for Garry in one of his shows, and I was producer of that.

Q What kind of series was that?

A That was a who-dun-it mystery adventure se. . based on the Dr. Coffee story.

Well, I'm getting very much too detailed, b I have been involved in other projects, such as the Democratic National Telethon, Will Rogers, U.S.A. and various other shows, and that pretty well takes us up to the present.

Q Have you ever participated in any negotiati s with the television network?

A I think a fair way for me to describe it wo d be that I have contributed to it. I mean by this, Mr Hruska, that though I, personally, have not been dire tly involved with the negotiations, I have prepared infor ti n for our business affairs people and our legal staff t carry out these negotiations.

Q Okay. I will ask about that, but first let me ask you this:

In a package deal between a network and a pack-ager, what does the packager convey to the network?

MR. TOPKIS: I think,your Honor, the better way to get that is through the package deal contract.

THE COURT: You are free to submit one, too I am perfectly willing to hear life testimony on it.

A In other words, what do we sell? What in e der

does the package contain?

Q Right.

A Well, it contains all the elements of the show put on that tape and physically it is that tape, and we are selling the network the right to air that show for either one performance, a second rerun, a third rerun depending on the terms of the deal.

Q Is there a separate price for each run?

A Yes.

Q So what the network conveys to the packager is a price per run?

A Correct.

Q Are there any elements of a program which are not included in the deal?

A We have to deliver everything in connection with the production except the music performing rights.

Q You do supply the synchronization rights to music?

A We do.

Q How do you determine the price at which you are willing to sell to the network the right to make network runs of the program?

A Well, the first thing we have to do is put together, to our best knowledge, the cost of each specific

item that we are dealing with. Even in variety shows, one has a greater or lesser degree of costume, scenery, studio time, cameras, video tape usage, et cetera, and what we do is first make up our schedule and say we are going to operate on a five-day week, "X" number of hours a studio, and we figure our costs on that. We allocate "X" number of dollars for costumes. In our case, it is a little above average because Carol, being a lady, has to look nice, and that costs money.

Scenery has its allotment. We allocate, we figure how much sketch sets are going to cost. We allocate the monies for two to three production numbers which is our normal. We then have the various small sets that we use weekly.

So, all of this information we are able to come up with a fairly good estimate.

Then, of course, we put on our own production fee for our profit so the company can function and have its overhead, and this is our rock-bottom cost that we will go to the network and negotiate on.

Q Have you ever had an occasion to renegotiate a package price with the CBS Television Network when it appeared that you might have to go over your budget to obtain any particular program element?

MISS KEARSE: Objection. The question is leading. If there was an occasion to renegotiate --

THE COURT: It is really a leading question. I can't feel very strongly about that kind of thing in this kind of trial. But, in any event, have you had any reason to renegotiate your fee with CTN?

THE WITNESS: Yes, your Honor, we had. I ~~can~~ CAN cite one specific example. There have been a couple, as a matter of fact.

Harvey Korman, who I hope most people know, he is our leading man in our show, he is Carol's top featured performer. When we organized the show in '67 we had budgeted "X" number of dollars for that role. We knew we had to have a leading man for her. We didn't know who that man would be.

After we had settled with CTN on the overall price of the show, and they are, of course, privy to the individual elements, too, at that time particularly, we said, "Look, we want to get Harvey." He suddenly became available. He was Carol's first choice. She was the one up there doing it. And it was the entire staff's first choice as well as Mr. Hamilton's. And we said, "Let's get him."

But there was no way we could get him for that

price. So we explained our problem to business affairs at CBS and they fortunately agreed with us, and being a new show, we -- they wanted to help us, and they understood the problem, agreed that Harvey was very vital to us, and gave us more money for his contract on a weekly basis.

So our package was increased slightly to accommodate his fee.

Now, another thing happened which perhaps is relevant. When our head writer, Arthur Rosen -- he had a better offer, and we were about to lose him. So, in order to keep him, it was very vital -- this was in our fourth season, I believe -- we negotiated with him, and in order to be able to keep him we gave him -- we had to give him more money. And CTN also went along with us and increased our package that season to accomodate an increase for him which was not built in the overall increases for the show.

Another instance I might mention, coming up, is, we have been invited by the Australian Government to open their new opera house in Sydney, and Queen Elizabeth is going to be there, and this was intriguing to us and Carol. So, in order to go down there and do that show, there are other costs involved, and CTN has already agreed to give us an extra $25,000 to make

that possible, because they believe it is important, would be an important show for us.

Q The Carol Burnett Show is on every week, is it?

A Yes.

Q Could you outline the basic steps in the production of a single Carol Burnett program? And perhaps, as you do that, indicate the timing of the music selection process.

A Very well.

Basically, we work on a two-week basis. Let's call it a pre-production week and a production week. The pre-production week consists of pulling together and creating the sketches and the musical numbers, and the first time that those elements are pulled together is at a Tuesday morning meeting.

That Tuesday morning production meeting basically consists of the creative staff or the heads of departments of the creative staff, and it is a tossing around idea session. Most people at that point on the staff have looked ahead and know that we have Tim Conway and Cass Elliott as a guest, and we pretty well know what to start thinking about.

The choreographer and the musical writers and the designers put their heads together and all of us spitball on what kind of production number we should

do that week, what kind of sketches we need; we have got Tim, we have to have something for him and Harvey, and so forth.

Now, we try to at that point begin our musical selection process, because we have got to get that music cleared, not only through the network clearing system but through the music synch. operation, which is our responsibility.

So we try to at least have two or three possibilities in music so that we, throughout that day, our people who work on that area, can feed that information into the machine and find out whether or not we can clear those specific songs, whether or not we have a problem, if synch. is going to cost too much, what is our choice, and so forth.

So, by Wednesday morning, the next day, we can begin to pin this down. We know, if we have a costly situation in music synch. that we feel is too high, can we go to another song that has a possible alternative? But at least we have the overall picture.

If we have a lyric change in a major performance, can we get that lyric change? We hope to have a lot of that information by Wednesday.

Now, for the loose ends that we don't have, then

we start pulling together on Wednesday. But by Thursday morning we have got to have it fairly well nailed down by noon, two and a half, three days at the latest, because the designers have got to start to work and they can't until we are sure about our production numbers, about our guest spots, our soloists, our singer, and so forth. So, all that, of course, has to be decided before the designers can design.

The designers must have their designs in by Friday or we don't have physically the costumes, the scenery and the props in time for rehearsal and for production the following week.

That more or less is pre-production.

Now, production week we pick up with the cast on Monday and we have our reading. If a sketch doesn't go, if it's rotten, we throw it out, we try to get a substitute, and hopefully it is not going to cost us a lot in throwing out scenery. But we are not going to settle for poor product. We are going to spend the money and get rid of the sketch if it's bad.

So, all decisions then become final and the production rehearses for a run-through on Wednesday. Of course, the musical decisions have been made because the arranger and the copyist have to get to work because

we prerecord the show, any elements that are prerecorded, on Thursday evening, also rehearse all the unprerecorded music that night. So that's an important deadline because things have to go smoothly. That is a costly hourly situation and we have to keep that orchestra rehearsal nice and tight.

Then we get to Friday. We have rehearsed in the studio, incidentally, all day Thursday. Friday is our run-through at 11:00, our dress rehearsal at 4:15, which we tape, and our final performance at 7:30, which we tape.

So that we have a choice. We do not go back and do retapes. We tape as-is, and if the scenery falls in, it falls in. And if Carol's dress falls off, we hope it is funny, and we go on from there.

That roughly is the way we do it.

Q What factors do you take into consideration in choosing music for the program?

A Well, our show, like any variety show, has a specific need in music. It basically is ~~related~~ related to Carol herself and the production concept of the format.

I would say that we are very interested in freshness, we are interested in the Broadway musical picture, we are interested in what is going on in movies musically. We are not interested in hard rock; that is not our bag.

THE COURT: In what?

THE WITNESS: Hard rock, rock and Roll.

A (Continuing) But I don't want to say that we are not interested in the contemporary bag, Mancini, Jim Webb. Those people we like. It basically is what Carol herself is in tune with and what she relates to.

So that's why rock and roll is not our bag. Carol does not relate to it.

Does that answer your question, Mr. Hruska?

Q Let me ask some more.

Do you consult with other performers other than Carol Burnett regarding music selections?

A Of course. If Steve Lawrence is on the show, we are not going to arbitrarily say to Steve, sing so-and-so. Obviously a guest singer very much is involved in what he is doing.

For us it works pretty much this way: The singer will bring in one to three selections -- it is more three than it is one; there are always at least a couple -- for us to talk about, and if it fits our format, if it does not conflict in style or tempo or whatever with anything else in the show, and if it gives us a good balance, fine.

If we feel that none of his selections are good, we will have a couple to propose to him. We may do that any-

way because it may ring his bell more than what he is bringing in.

We try, most of all, not to duplicate music either within a given program or a given few weeks or even a season, for that matter, and we try very hard not to duplicate what that specific singer has sung on another show recently.

Q Why?

A Well, the variety show -- there aren't many of them nowadays, number one; and we have found, the networks tell us anyway, the people who know, the experts on the demographics and the ratings and so forth, tell us that most people who watch a given variety show watch most of them at any given time. Therefore, our audiences for the Carol Burnett Show, for Julie Andrews, for Dean Martin, For Bill Cosby, are pretty much the same people.

And obviously we don't want to repeat something that Martin has done or that Andrews has done, ever really. Oh, we may within a season, if it's a whole different concept or if it's a very popular song, but we don't like to do that.

5B

Q Have you ever thrown out any song that you ha[d] tentatively selected when you heard that some other television network program was going to do it?

A That happened, as a matter of fact, last [year]. At the point where CBS moved us from Wednesday to Satur[day] and ABC moved Julie Andrews from Monday, I think she wa[s] on, to Saturday, an hour before us, and Julie Andrews i[s] a close personal friend of Carol's, and the production team on Julie is close to us, and we talk a lot, and suddenly, through conversation, it came out that she ha[d] just taped a number --

Q "She" being Julie Andrews?

A Julie Andrews had taped taped a production number based on -- well, the song isn't coming to me. It was a march, Pippin perhaps, or one of the current shows.

At any rate, we had planned it and we had th[e] scenery designed, fortunately not built yet, but we immediately cancelled that whole thing and changed our production idea. I don't even know that it would have aired the same night, but it would have aired within a couple of weeks.

We try very hard to steer away from that.

Q Has this ever happened outside of a big produ[ction]

context, in other words in connection with a special guest performer?

A Well, I mentioned Lawrence a while [illegible] of the things I was referring to was, in the spring [illegible] wanted to do -- came on and wanted to do "You Are [illegible] one of his records, and it is a good song, and we [illegible] fine, and as we were exploring that he said he had [illegible] taped it on the Martin show.

We said as politely as possible, "Could [illegible] find another selection, Steve?" We did change his [illegible]

Q Could we focus on the production numbers? Can you tell us specifically the thought processes you go through in choosing music for production numbers?

A Okay.

THE COURT: Before you do that, Mr. Wright, will you tell me what you mean by a production number? I mean, I watch your program now and then, I am sorry to say I don't watch it every week, and I watch others too occasionally. I am sure I must know what a production number is, but I want to be sure I do.

THE WITNESS: Certainly. A production number is normally a full-stage creation, involving dancers and/or singers and a lot of people and a lot of costumes and a lot of scenery. It is big.

THE COURT: And there is normally just [illegible] production number to one of these programs?

THE WITNESS: Not necessarily.

THE COURT: That was what made me wonder, because we were all talking about "the production [illegible].

THE WITNESS: I see. No. We normally have at least two, sometimes three or more. Andrews has more than that because she is more of a singing star than Carol, Carol being principally a comedian who sings. Julie is a singer who acts.

So we try to gear on a norm of two to three production numbers. Each one will vary in cost and scope depending on how lavish you want it to be. And normally this production number is an opening number or a finale or is in the middle somewhere.

THE COURT: I think I understand it now, but just wanted to be sure I wasn't confused about there only being one. All right. Now let's go ahead.

BY MR. HRUSKA:

Q How do you pick music for that sort of produc number?

A Okay. We have a staff of creative guys, a very good staff I think, who write special music for us, and they, first of all, will submit in the production meetin

ideas, new things that they've heard or that have come to their attention through music publishers who have sent them songs or demonstration records, or we've heard the score of ~~a little light~~ "A Little Night" music on the radio and somebody has flipped over it and said, "Hey, there's a great waltz in there. Let's do it."

The choreographer is very instrumental in production numbers because he is the one who's got to figure out how it is going to work. He is the dancing traffic cop, to make it all ~~put~~ pull together. So he contributes, and his opinion is valued.

All of us in that meeting discuss the merits of that, and what we are looking for, again, is the same thing you are looking for in music: a twist, an idea, something fresh, something we haven't done, something that gives the program bounce, something that will give it a tone, a mood, an up or a down, whatever we need to give it a sweep and keep it interesting and varied.

Q There are some production numbers, are there which are built around a specific set?

A Oh, yes.

Q For example?

A When "Applause" first came out, the musical "Applause" first came out, the song "Alive" in it was

to us a very exciting number, and at that time the publ r was anxious to have his music exposed, and we had an advance copy of it, and it also was the kind of song th Carol herself related to, she could do it, and we all said, "Let's do it. We don't know how, but let's do it It is a good song."

And then we would decide how we would do it It turned out to be an opening number. It is a rather obvious song number, but it happened also to be the fir opening number of the first show of that season.

So the production idea in this case was: we started with Carol in her dressing room preparing fo her opening show of the new season, pulled her out, and had the whole show business look, television backstage look, and had her come forward and ended the piece as the audience was applauding.

Q Are there production numbers that contain a number of songs?

A Oh, yes. We do very often medly finales, w call them, in which, if we are doing a salute to a studi which we do fairly often, we will take a collection of M-G-M songs and weave them into a pattern in which all the cast, the guest stars, the entire cast of the show, perform and actually in a production number as opposed

to a sitdown medley. It is a produced group of songs.

Q Could you give us any other examples of specific themes for production numbers that have been employed on the Carol Burnett show?

A Well, there are so many over six years. You run out of ideas, as a matter of fact. I guess we have hit every country and every time: Calypso for Caribbe: we've had a Russian thing, with Russian dancers; we've even gone back and added an Aztec look at one point and did South American with a crazy beat, this kind of them

Q And how do you pick the music for a productic number based on a theme of that type?

A Then you are much more flexible with your music, because what happens is the idea comes first, or the production look comes first.

Q Comes before the song?

A That's right. And then we find the song o a possibility of any number or songs that would fit tha look.

Q Do you usually have priorities among those?

A Oh, yes. We have a first choice and a sec choice. If we have a problem, for example, in music, and they want five, six hundred dollars for a single license, and we can get a second choice which is almost

works as well for us for a hundred, we are going to take that, of course.

Q What categories of music do you predominantly use on the Carol Burnett show, if you can generalize it that way?

MR. TOPKIS: I'm sorry. I didn't hear the answer.

THE COURT: There was no answer yet.

MR. TOPKIS: That explains why I didn't hear it.

A Categories. Well, I think, as I said before the Broadway stage, Broadway musicals, movie music, then contemporary, popular songs, and of course standards.

I think every area except the rock and roll group. We don't gothat direction.

Q What part does the CBS Television Network play in the selection of music for the Carol Burnett show?

A CTN?

Q CTN.

A None.

Q Excuse me?

A None.

Q Has anybody at the CBS Television Network ever played any part in selecting any music for any program with which you had any connection?

A No.

Q What would your response be to a CBS Televi[illegible] Network employee coming to you and saying, "Gee, Bob, I think you ought to do the following two or three son[illegible] on next week's program" or "The following song on next week's program."?

A I would try to be polite, but I am afraid I would say, "Thanks a lot. Good-bye."

They don't do that. We would not ~~take kindly~~ take Kindly to them interfering with our production.

Q Do you have people who write special music [illegible] the Carol Burnett show?

A Yes, we do.

Q How do you go about choosing such people?

A For us it's been a process of people that we have worked with through the years, who we know do the kind of special composing that specifically fits our m[illegible] and fits our stars and our guest stars.

I think in every case our people have been [illegible]ple who we have worked with prior to this specific project If it is someone new, it is someone whose work we have heard through other shows or through other media and we feel they are good and they are right for us.

One of our writers, if I may become specif[illegible] is Ken Welch, and he is with us now. He has not

been with us on this show or on many others. But, to show you what I mean, he wrote "I'm In Love With John Foster Dulles" for Carol way back when she first became recognized, when she was first making her mark, and that was in 1956, I think. And it is a good relationship, it is a good sympatico. He does good things for us. So, naturally, we try to get him whenever we can.

Q Has anybody at CTN ever played any role in selecting composers to write special music for the Carol Burnett show?

A No. It is totally us.

Q Could you tell us how much these people are paid, that is, the composers who write special music for the show?

A Their salaries range from, I think, $1800 to twenty-five, roughly.

Q Per?

A Per program; 1800 to 2500 per program.

Now, most of them have other related jobs. They do not just play, just create music. They rehearse with the guest stars. They, of course, are involved in the meetings and the putting together of medleys, which is an art in itself.

THE COURT: Is this the salary for all of their

services or just for composing?

THE WITNESS: That salary is for all their services.

MR. TOPKIS: May I inquire, is there one such person per program or is there a whole group of them?

THE WITNESS: The answer to that is, for us we have a staff, and the staff consists of three of those people who do that type of thing.

THE COURT: And they are paid for every program?

THE WITNESS: And they are under a per season contract, all shows produced, 24. So they are part of the permanent staff.

MR. TOPKIS: And each of them is paid 1800 to 2500 per?

THE WITNESS: Within that range, per program.

MR. TOPKIS: There are 24 programs?

THE WITNESS: 24 programs, and also residuals. Every one of them receives residuals on reruns, and that normally is 50 per cent.

Q 50 per cent of the initial fee applicable to the initial run?

THE COURT: Are you sorry you gave up your piano lessons, Mr. Topkis?

A Yes, Mr. Hruska.

Q Is there any way to generalize on this? Could you say these people are paid primarily for writing music or primarily for their other activities?

A No, I would say primarily for writing music. The other things are subordinate.

Q Would they be on your staff if they could not write this kind of music for your program?

A No, they would not.

Q And in addition to the payment you've just described, these people receive ASCAP or BMI distributions?

A Yes, they do.

Q You mentioned before that one of the things that you did during the pre-production week was to obtain synchronization rights licenses for the music that you wanted to use on each program. How do you do that?

A In California there is a gentleman named Bernard Brody who for ~~many~~ MANY years has worked in the music business. He has a kind of a one-man operation. He has a business in which he is our agent for securing the rights to music synch.

THE COURT: What is the first name?

THE WITNESS: Bernard, B-e-r-n-a-r-d, Bernie.

What we do is: our man, our production supervisor, who is a member of our staff, is in charge of that.

He works under me and he feeds Bernie all of the songs that we have made a determination on in those Tuesday and Wednesday meetings prior to the week of production, and Bernie through, I understand, primarily the Harry Fox Agency, secures those synch. rights for us, and it can normally be done within that two-day span quite easily, as long as we give him the information.

Occasionally, if there is a problem, it will hang over until the next day, to Thursday. But we pretty much are able to pin down the synch. rights during the pre-production period.

Q Do you have any way of estimating what part of the synch rights licenses you obtain are handled by through Harry Fox?

A I would --

MR. TOPKIS: Excuse me, please.

With respect, I would suggest that Mr. Brod or somebody from Fox may be better able to tell us.

THE COURT: The question was whether Mr. Wr has any way of knowing. If he doesn't know, that's t end of it.

A I'll tell you what I base my answer on.

The contracts that I signed, that Bernie has issued to me, tells --

Q The synch rights contracts?

A The synch rights contracts that I must sign close the deal, also has the co-signature on it.

THE COURT: Of ~~the~~ Fox?

A Of ~~the~~ Fox or whomever -- both sides of the bargain. And, based on that, I would say that roughly to 90 percent of our synch rights flow through Harry Fo

Q Do you obtain those synchronization rights licenses before or after you have taped the program?

A Oh, before.

Q Why before?

A Well, we don't want to get trapped. Obviously we have had occasion, very rare, that we will have an ad lib of a musical thing from Carol, who bursts out with suddenly in the middle of a sketch and it's funny and we want to keep it, but before we air it, we immediately try to get the synch rights. If we can't, we have to cut it from the tape ~~under the table~~.

But, most of the time we can get it and we can get it for around a hundred dollars is the average price, 50, 100 to 150.

Q I didn't hear that range.

A Fifty, 100 to 150. But most of the time, 99 percent, yes, we have to get them up front.

Q Do you ever pay more than that range you described?

A Yes. There have been occasions when we have -- I think the most we ever paid was 600 and I think that was for the Harry Birthday thing.

THE COURT: What is the Happy Birthday thing? I have heard about this, before.

THE WITNESS: Well, Happy Birthday. It's a song -- I don't know if it's true or not but it is owned by a little old lady --

THE COURT: Is that the song?

THE WITNESS: The song -- Happy Birthday to You.

THE COURT: Does somebody know who wrote that?

THE WITNESS: Well, a little old lady from Pasadena owns the rights. We say that. I don't know who wrote it but she or it or her or they, but they think it's the greatest thing since Come Jesus in Whole Notes -- that slang expression, I am sorry; I apologize.

She thinks it's a hot property and she can get a bt of money for it.

THE COURT: She seems to be right.

THE WITNESS: I don't know. That's debatable. It's never used because of it. I wonder how much she would get if she would come into line. She would get more, I think. We used it once.

THE COURT: I thought it was a folk song.

THE WITNESS: Well, somehow she got the rights. We used it once with Ray Charles but there was no other song --

THE COURT: As a matter of curiosity, putting aside a specilization like that, a special situation, is there a substantial variation -- of course, talking about synch rights only at the moment --

THE WITNESS: Right.

THE COURT: -- the synch rights for the music somebody like Burt Bacharach, let's say, on the one hand

and a composer like, well, one of the greats, in a [illegible] Jerome Kern, or somebody who is not known at all?

How do these things get set?

THE WITNESS: Well, in synch rights, it has fairly well found its form. There is not a great deal difference, we have found.

THE COURT: It's a fairly standard charge?

THE WITNESS: Correct. In that $100 area. used to be, in the early days, back in --

THE COURT: Does it depend on the length of program?

THE WITNESS: Well, it does not depend on the program, no. It could be a 30 minute, hour, whatever, if it's too high and you can't negotiate it down, then have got to make the choice of whether to use it and pa the money.

THE COURT: Of course.

Q Why?

A I'm sorry, Mr. Hruska. You have lost me.

Why are we sitting here?

Q No. Why is it?

That's a good question, too.

Why would you use the less expensive song?

THE COURT: I don't think that Mr. Wright sa

necessarily would.

MR. HRUSKA: I understand.

Q Under what circumstances?

A Under what circumstances would I use the less expensive song, as opposed to a more expensive song?

Q That's right. Let's say you have a song on which the synch rights quotation is $600 and you have got another song on which the synch rights quotation is $50.

A Okay. I would use the lower priced song if I have two equally good songs or almost equally good songs that will serve my purpose. Let me give you an example.

In a sketch, we wanted to set a Venice scene. It was a gondola thing and we wanted the gondolier to sing an Italian song.

Santa Lucia is perfect and the writers wrote Santa Lucia. We tried to get the synch rights and Santa Lucia was $300. O Sole Mio cost $50. Well, obviously, those two songs are equal. If you want to be Italian, Santa Lucia is as good as O Sole Mio and vice versa.

So, we, without hesitation, went for O Sole Mio. There are little uses like that that are simple decisions.

Sometimes, in a major decision, it is difficult, or you are simply not able to, but we try to always have an alternative, if the price gets out of line for what we feel,

our use for it gets out of line.

MR. MRUSKA: I am about to turn to a new sub, your Honor. Would this be a good time?

THE COURT: A very good time to go to lunch.

(Luncheon recess.)

AFTERNOON SESSION

2.00 P.M.

ROBERT B. WRIGHT, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. HRUSKA:

Q Mr. Wright, I would like to describe for you a per use system and then ask you some questions regarding how you would operate under that system.

THE COURT: May we put it this way -- "Assume, if you will, that" --

MR. HRUSKA: Right. I was about to use almost those very words, your Honor.

Q Assume, if you will, that ASCAP and BMI have issued, as a result of this lawsuit, per use licenses to the CBS Television Network and assume that those licenses will cover either all of the music in the ASCAP and BMI pools or all of the music in those pools which has any realistic possibility of being performed on a television network; that is, music now in existence.

Also assume that the license will provide that the CBS Television Network will pay to ASCAP or BMI a stipulated fee for each use of that music which is not licensed directly from the copyright proprietor; if it is licensed directly from the copyright proprietor, then

the CBS Television Network will not pay a per use fee to ASCAP or BMI --

THE COURT: Mr. Wright, you look as if you understand everything but, if at any point --

THE WITNESS: I can interrupt, your Honor?

THE COURT: Please be sure that you do understand the question because your answers will be meaningless unless we all understand the same thing.

A Along that line, Mr. Hruska, let me ask you what you mean. I am not too clear on the direct difference between the direct licensing and the licensing through the repertoire or pool, reservoir.

Q All right.

Direct licensing would be licensing of the right to make a public performance for profit of the musical composition from the copyright proprietor.

In other words, it would be a license issued by the copyright proprietor rather than the licensing organization, ASCAP or BMI, of which the copyright proprietor is a member.

A In other words, that would be -- I would deal directly with that man?

Q Right. In other words, if you, as a program packager, obtained a license directly from Shapiro,

Bernstein Publishing Company, that would be a direct license.

A All right.

Q Also assume that each copyright proprietor will have the right to cancel ASCAP's and B"I's, or BMI's, authorization to license the CBS Television Network under the per use license. In other words, each copyright proprietor would have the right to pull his music out of the per use reservoir and the copyright proprietor may pull any one or more songs and he pull songs for any designated type of use, such as, for example, feature theme or background.

Also assume that copyright proprietors, whether or not they have pulled music out of the per use license, will be urged to send to the CBS Television Network --

THE COURT: CTN.

MR. HRUSKA: Right.

Q -- the name, address and telephone number of a person whom they have designated to issue a direct license.

A In other words, the party that I would deal with for them.

Q Precisely.

A Okay.

Q Also assume that CTN will input such information

into its computer system.

Also assume that CTN will further input into its computer system the title of each composition covered by the per use license and per use price list and the names of the writers and publishers of those songs.

Further assume that the computer system will be maintained in the music clearance section of CTN so that when a producer calls to obtain a status report on any particular song which the producer is interested in using, he will give the title of that song to the employee in that music clearance section who answers the phone and he will receive from that employee, within a matter of minutes, or seconds, whatever information there is regarding that song in the computer system.

Also assume that provision would be made for including within the coverage of the per use license, after some period of time, new music which is picked up in the ASCAP or BMI surveys as having been performed on radio stations.

Finally assume that once CTN has obtained such licenses from ASCAP and BMI, it will turn over the function of licensing music performance rights to the program packagers so that the cost of music performing rights will be an addition to the cost presently incurred by packagers.

Now, the first question --

MR. TOPKIS: Before we get to that, could I have about the last 100 words read back? Specifically, those relating to the ASCAP performing rights index or something like that.

MR. HRUSKA: I didn't say index.

THE COURT: The addition of new music?

MR.TOPKIS: Right.

(Record read.)

THE COURT: Very good.

MR. TOPKIS: Thank you, your Honor.

Q How would your production company compensate itself for incurring that additional cost?

MR. TOPKIS: Excuse me, your Honor. Is that question feasible of even opinion response? I submit that it is not. It would compensate, of course, as best it could. What can we possibly know, more than that?

THE COURT: Well, we will see. I don't think it is so clearcut that no answer can be meaningful.

Do you understand the question?

THE WITNESS: Yes. How will we receive the money for these additional expenses that we are incurring?

Q Exactly.

A We will receive them from the network, of course, like we receive all of the other budgeted items in our budget.

I think earlier today I mentioned that we had an increase for Harvey Korman and I mentioned we had an increase for Arnie Rosen and this would be an increase. We would simply go back to the network and say, "Fellows, here are our costs; this is a new element; reimburseus for it."

Q In other words, you would increase the package price?

A Yes.

Q Do you foresee any problem in getting CTN to pay you an adequate amount of money to cover this new area of cost?

MR. TOPKIS: Is this a question as to generosity, your Honor?

THE COURT: I'll sustain the objection to that. I think that nobody can tell. CBS may go through a depression three years from now and it may be hard to get them to do it.

The method by which we would go and the probabilities on which we would proceed, I think, are fairly clear enough.

I would say, I do not assume, I will be fair to state, I do not assume that there would be any special difficulties in getting CBS to do it, but I don't think anybody can predict what would happen.

I don't think you are obliged to prove that point to me and I don't think it's possible to prove it mathematically.

MR. HRUSKA: All right.

Q Let me go to your side of this.

Do you believe that it will be that it will be any more or less difficult to formulate a budget for music performance rights under this system than to formulate a budget for other program elements?

A At first, it will be difficult. I don't think it would be impossible.

THE COURT: May I interrupt for a moment?

What difficulties do you anticipate, quote, at first?

THE WITNESS: It's a new system. Anything new you have a lot of unknowns that I couldn't possibly specify at this time, but we do have, at least, a foundation from which to start, it seems to me, in a budgeting situation.

You know what the songs cost now through the blanket -- I should say what composers and publishers

are receiving for specific songs through their blanket license, so that to me is your base; that's where you start.

I would have to build in a larger contingency, naturally, than I would on my tried and true areas.

When we went, for example, from live to taped television, tape was totally unknown to us. We didn't know the entire ramifications of cost, [illegible] going from a live situation to a taped situation.

You have got your obvious elements of the tape, of longer hours, because you are not doing it live; you are going to do retakes, you are going to take longer than one hour to do a one-hour show.

But there were a lot of little built-in things that we didn't know about. We found them and settled down into a comfortable budgetary situation.

It happened again when we went to color. Color really frightened a lot of people, because that was even broader. The color in the sets, the color in the costumes, the make-up, was an enormous fear thing for people in production.

So, we had to build in costs. Again, the contingencies gradually settled down to a normal course.

We found our way, we didn't lose money and the

networks were experimenting with us.

So, I would treat the system like I would treat that kind of experience. I would expect it to be difficult at first and we would grope at first but I would expect to settle down and become a normal area.

Q Do you have any basis for expecting that CTN would increase the previously negotiated package price so as to accommodate any unbudgeted music costs, unforeseen music costs?

A Yes. Again, that is part of the experimental area that we are dealing with in the early stages.

For example, if we have determined mutually, the network and ourselves, that we think it will be an average of "X" number of dollars as an increased item for us, and we come to Show No. 3 for the '74 season and we suddenly see that we have topped ourselves budgetwise, because we have more than the usual amount of music on that show or we have discovered that it is costing us more, we are picking songs that are more costly, perhaps, than others, and suddenly we need a production song that is new and current and we want to do it and nobody has done it and it's going to cost us twice as much as it would normally, and we are out of funds, I would go to CTN, to the business affairs, and say, "Gentlemen, here is my problem; we feel it is vital," and the history of our relationship with them has proved to me that they would say, "We will go along with you," and they would make it good.

I, as a matter of fact, have those assurances.

The one thing that Mr. Sipes has spoken to me about was the financial side. He said, "You will not" --

MR. TOPKIS: Excuse me. At this point, I have to interrupt. I don't think Mr. Sipes' statement to this witness is proper evidence here.

THE COURT: Well, Mr. Wright, what Mr. Sipes said to you would be hearsay, so don't testify to that.

THE WITNESS: Okay.

A (Continuing) Then let me say the business affairs department of CBS has always, traditionally, understood our financial problems in a new situation, particularly ones which they are instrumental in creating.

MR. TOPKIS: So much for the hearsay rule, your Honor.

THE COURT: I think he is reporting a course of action.

MR. TOPKIS: Yes, I am not criticizing the witness, your Honor. It just was an inevitable commentary.

THE COURT: All right.

Q Mr. Wright, I would like you to put yourself and your mind at your Tuesday meeting of your pre-production week and assume ~~thatyyou~~ that you have just made a tentative selection of a musical composition that you want to use on the program that you will be taping a week from Friday, and you are in this per use system which I, a few moments

ago, described.

A Right.

Q What do you think is your next step at that point? What do you do?

A You are asking me what my procedures would be, working under this system?

Q Yes, sir.

A All right. As I understand it, a member of my staff or myself would call the music clearance department at CBS. We would say, here is the name of the song, the composer, if we know it, what other information, like we normally give for music rights now, music clearance, I should say, and what is the status, I would ask, of the price of this song.

I would have, in my office, a television monitor with a computerized readout system connected with it from their office, similar, as I understand it, to what the airlines use -- is it like that system?

Q I believe so.

MR. TOPKIS: May I suggest that this suggests a degree or divination or possibly preparation on the part of the witness.

MR. HRUSKA: Of course preparation. We have discussed it.

THE COURT: I take it that you have been advised before you came into the courtroom today that there might be such television computer arrangements, is that right?

THE WITNESS: Oh, yes, indeed.

THE COURT: And there has been testimony to that effect, so I think it is a proper assumption, even though it comes in this manner.

THE WITNESS: I think Mr. Hruska just mentioned that in his explanation.

Q You were here during Mr. Sipes' testimony, weren't you?

A I heard it from Mr. Sipes the other day.

MR. HRUSKA: We have discussed this, of course.

THE COURT: I don't see anything improper.

A (Continuing) Okay. I am trying to put it in my situation.

Okay. So we see what is the status of that song. If it is in the reservoir, I will get certain facts about it. It will cost "X" number of dollars and I note that on my budget tear sheet, and if I am satisfied with it, fine. I know what I am paying for.

If it is not, I will --

THE COURT: If it is not, what, in the reservoi

THE WITNESS: If it's not in the reservoir.

A (Continuing) The readout will give me this information and the name and a number of someone to call and make a deal.

I will do that, I will call him, or one of my associates will, and we will bargain with the agent in charge directly and try to purchase the piece of music.

Q Let's assume that you have tentatively selected three songs for possible use in a production number for one spot in the number. In other words, three alternative songs.

And let's assume all three songs are in the per us reservoir.

Do you think you might try to get bids on those songs?

A Do you mean renegotiate the price that has --

Q Price quotations from copyright proprietors.

A There may be instances where that may occur.

For example, if one of the three songs, let's say our first choice, the price was considerably higher than the second choice but I really wanted the first choice, it was a strong first choice, certainly I would try to -- I would call the publisher or copyright owner and try to make a deal with him. I don't what leverage

I would have at this moment. It depends on the circumstances. If I couldn't, I would go to the second, I suppose, or if I wanted it enough. I would pay the price.

MR. TOPKIS: I have no objection to such hypothetical questions but I think we are getting all tangled up. I believe the question was put to the witness, suppose there are three songs all covered by the per use reservoir, and do I gather that when the witness presses his computer button, he is going to get three different prices for the three songs?

THE COURT: No. You are confused, I think it's only you.

MR. TOPKIS: Perhaps so.

THE COURT: He was asked whether he might, if he was presented with three songs all of which belonged to the reservoir, ever attempt to secure a direct license at a lower price, and he said there might be such an occasion, as I understand it, if he was particularly interested in the Song No. 1, let us say, which was of an extraordinarily high price under the per use system.

MR. TOPKIS: But under the per use system, they are all the same price, the per use price.

That is what my confusion is.

THE COURT: I don't quite understand it. The per use price for one song may be different --

MR. TOPKIS: No. The per use fee set by this Court as the fall-back per use price is the same price for every song, for the same use.

MR. HRUSKA: I thought it was very clear that if in getting these price quotations from the copyright proprietors, the prices were different, then he would do what he said he would.

MR. TOPKIS: No.

THE COURT: If that is the question you asked, we are in all kinds of confusion. I have never seen it stated, altough I certainly have no objection to it, that it was stipulated, as you apparently seem to believe it is, that if there is a per use system involved and if a per use fee is not arrived at by negotiation and the Court were asked to fix a fee, that the fee would necessarily be the same fee for all songs, I am perfectly prepared to accept that by stipulation, if that is what is understood.

t2A

MR. HRUSKA: No.

MR. TOPKIS: We want to know what CBS means and then I'll understand it.

MR. HRUSKA: There certainly is not a stipulation to that effect, your Honor, and I think it has been our position from the outset of this case, at least from the point of time in which the liability and relief stages of the case were separated, that the price tags that would go into the previous price schedule is a matter which should be left to the relief stage of the case.

I have not been interrupting Mr. Topkis, I believe, in his statements, and it does seem that everytime I try to explain something Mr. Topkis jumps up and interrupts. I would ask your Honor perhaps to suggest to Mr. Topkis that he not do that.

THE COURT: I don't like interruptions that aren't necessary. There is no question about that. I won't comment on whether Mr. Topkis's reason for rising last time was necessary. Since he didn't understand the question, I think it was okay for him to try and find out about it. But this has led to another course of discussion which should be clarified for the benefit of all of us here.

In any event, although it certainly needs to

be clarified, I don't know that it needs to be clarified at this very moment. It needs to be clarified among counsel and the Court as a basis for our proceedings and future hypothetical questions.

To get back to the occasion of Mr. Topkis's standing, which was what was the question put to the witness, I thought I understood it and now I am beginning to wonder whether I understood it.

You asked, and correct me if I am wrong, whether, if he found that the three songs he was interested in on the show were all covered by ASCAP's or BMI's per use schedule, had not been pulled, in other words --

MR. HRUSKA: Right.

THE COURT: -- he would make any attempt to secure a direct license for them. Isn't that correct?

MR. HRUSKA: Yes, your Honor.

THE COURT: All right. Now, the witness, as I understood it, replied that he could conceive doing so in the event that one of the songs he particularly wished to have was especially high priced.

Is that correct?

THE WITNESS: That's correct, sir.

THE COURT: Whether or not Mr. Wright was correct in assuming that that could happen, that was the basis of

his answer.

THE WITNESS: That's true.

THE COURT: I now ask Mr. Hruska whether, as CBS contemplates the possibilities, that is a valid assumption for the witness to proceed on. Did you contemplate that there would be varying per use prices?

THE WITNESS: That was my understanding.

THE COURT: Prices for various songs.

THE WITNESS: Yes.

THE COURT: That's what I assumed that you did.

MR. TOPKIS: Is that the CBS proposal?

THE COURT: Now I am asking Mr. Hruska whether that is within the CBS proposal.

MR. HRUSKA: The CBS proposal does not rule out that possibility.

THE COURT: All right. That's enough, then, at the moment. I mean, where that will leave us is another question, but that's enough. It describes to me what CBS's present position is.

MR. TOPKIS: Then that is our target. That is to say --

THE COURT: The target is broader than you thought it was.

MR. TOPKIS: Exactly. Now I understand that. Okay.

MISS KEARSE: I would, for one, really like to know exactly what the proposal is. It is very difficult to try this case without knowing what we are shooting at.

THE COURT: You're telling me?

Yes, I agree we need to recanvass the situation in the light of ~~their~~ this development, but I don't want to totally interrupt the witness's testimony. I don't know whether he is going back to California or not, but this is the last day of today's trial week, so let's get along with the testimony and then let's let the lawyers and the Court talk out ~~their~~ this particular development immediately afterwards.

BY MR. HRUSKA:

Q Mr. Wright, let's assume that the per use price schedule was set in such a way so that all feature performances of a musical composition within the per use license - that is, in the per use reservoir - were available at the same price.

THE COURT: As each other.

MR. HRUSKA: With each other; that's right.

Q In other words, any ASCAP or BMI song under the per use price schedule was $650 for a feature performance.

So that the basic rate is not a contending

factor, in other words?

Q Within the per use system, correct.

A Within the per use; okay.

Q Now let's assume that you have got three tentative selections for one slot on your program.

A Right.

Q Tentative selections of musical compositions. Under those circumstances, do you believe that there would be any occasions in which you would attempt to negotiate with the copyright proprietors of those three songs or get bids from those proprietors?

A Well, if the basic use is the same money, then I ~~can't~~ CAN conceive of a possible very minor use of it that I would feel that that basic fee is too high.

For example, just saying the title, which we often do in sketches, as a line is not really a performance; it is a use of the title, of the name. I would think this would be an exception. I would like to at least try to bargain for that.

Q Well, let's suppose that you got bids on those three songs..

A Yes.

Q And there was a substantial differential among the bids you got.

A Well, under this circumstance that I just outlined --

MR. TOPKIS: Could I know what that circumstance is? I'm lost.

MR. HRUSKA: Let me finish asking the question.

Q Would that price differential or would the different prices of each of these three songs, influence your selection of the song for that slot?

A Yes.

THE COURT: Could you make clear to me what price differential you are referring to?

MR. HRUSKA: I didn't quantify it.

THE COURT: I mean the amounts. The difference between what?

MR. HRUSKA: We posited a situation, your Honor, where the previous price --

THE COURT: Is it the same?

MR. HRUSKA: -- is the same. I happened to mention $650. I just pulled that out of the air.

THE COURT: Right.

MR. HRUSKA: Okay. And we are further assuming that Mr. Wright calls up three copyright proprietors involved and each one of those copyright proprietors makes a bid to Mr. Wright.

THE COURT: I understand you.

MR. HRUSKA: And there is a differential among those three bids.

THE COURT: I understand.

THE WITNESS: For my particular usage.

MR. HRUSKA: Exactly.

THE COURT: All right.

Q In obtaining other elements for your program, creative elements, let's say, do you now engage in any process of trading off among those elements based upon the prices of those elements? Do you know what I mean?

2 A Let me ask you in another way, just so that I know what you mean. Are you asking me that within the confines of my budget allotments for each element of my show, if I ~~tape~~ take from one and put in another or rob Peter to pay Paul, as it were?

Q That's the idea. You do that.

A Yes. I do that constantly. We do it every week.

Q Could you give me some examples of it?

A Sure. Okay. Week one, a lot of music, three production numbers, heavy costumes, heavy scenery. I've got to go over my budget and costumes and scenery.

All right. Where am I going to getthat money?

That specific week perhaps my prop and set decoration budget is low because we have so much music that we have fewer sketches. So I will take some of the allotted monies for the props and the set decorations and pump it into costumes and scenery, and I've solved my problem.

If I'm heavy in both ways, then I will borrow from one week's show and make the next show lighter. Maybe I know that I have a less costly current budget on the following week and I know that I can have some extra monies there, so I will take that out of that pocket and put it back into this pocket.

Does that answer your question?

Q Yes. What is your opinion, Mr. Wright, about whether, under the per use system we've described, the music performance right creative element would be one of the elements which become involved in this sort of trade-off process?

A Well, as I understand it, I have, if we are working under this system, number one, more money on top of my package, which I was given in the first place to pay for that item, to deal with.

Now, even though it is an additional item that I must furnish, I am additionally compensated for it. But it is part of my umbrella; it is part of my overall

budgetary allotment. So I would presume that I would use it just like I do the other elements. That would become a contingency factor. If one week I don't have as much music, I don't have to allot it to music, I can rob that pile and pay for my costumes.

It gives me flexibility. It gives me much more ability to control my own operation.

Q To make this really concrete, can you think of any specific example out of the past in which you engaged in such a tradeoff, some specific costume or scenery or special effects?

A Yes. Okay.

A production number comes to mind that we did on the Bill Conrad Show. It was about a month, six weeks ago. We had an artistic, shall I say, discussion about what the finale should look like, and all of our designers said, "Let's go for a white on white look. We haven't done that for a long time. It is pretty, it is unusual, smart." "Fine" we all said.

Then we started pulling in the estimates of everything, and what the costume designer had done was design white tails, dress tails, for all the men, white dresses for the ladies. We had the white dresses, fortunately, from a previous year. White tails we don't

have. Plus we had Bill Conrad. He is a big man. Plus we have Lyle Waggoner on our show, a tall man. Those tails had to be custom made.

So we could not rent them; in other words, they were not a rentable item. We got an estimate of $800 per tail. We didn't have it. We simply didn't have it. We were counting on $75 rental fees, not an $800 manufacturing fee.

We had at that point --

THE COURT: How many suits did you need?

THE WITNESS: We needed -- we had 12 dancers and four leading man, so we had to have 16 tails, 16 suits.

As it came down to it, we discovered we couldn't rent one for Harvey either. He is a big man. So it had to be made.

Now, you were talking about an additional $2400. I didn't have it. Had we known in time, perhaps we could have cut down another item. But we were up against the wire.

So in that case, I don't know if this is really a good example, we had to go to black tails. My designers weren't too happy, but they accept facts of life,too; they are working in the economic world. We did not have our white on white look. We had a black on white look.

But it looked fine. So people at home, who didn't know the difference, thought it was beautiful.

Maybe a better example of the tradeoff thing that you are discussing, that we are discussing, is this: we had a sketch. It was a takeoff on the Hunchback of Notre Dame.

THE COURT: That is a good fun subject.

THE WITNESS: That's what we kept telling the writers. We finally put it on. Harvey as a hunchback was pretty funny. But Carol as Esmerelda was required to crawl up in one of the bells, you know.

THE COURT: Right.

THE WITNESS: And the bit was that Harvey would ring the bell and she was inside, going crazy, of course. So we had to, number one, obtain somewhere a large bell that was not heavy, that our star could get into and not hurt herself, and be moved back and forth. He had to stand on it, like they did in the movie, if you recall the old Charles Laughton scene. It was a nightmarish problem.

Anyway, the special effects department of CBS, who usually does this kind of thing for us, gave me an estimate in the pre-production meeting of, I believe it was, $1600 for the bloody bell. Well, in proportion that is just incredibly high.

THE COURT: Your ball budget is not that high.

THE WITNESS: My ball budget is not that high. Our entire prop budget is thirty-three. So, if that took up half of it, you're dead.

Anyway, we didn't want to throw out the sketch. Yet without that prop you have no ending, you have no sketch. It all builds to that climax. So let's find a cheap ball.

Okay. We shopped around. We found a young kid who kind of works in his home, and he does miracles with foam rubber, and he had worked for us previously in the costume area, and he said, "Sure, I could build you a ball out of foam rubber and with a frame that should do what you want it to do. We'll build a little platform on which she can stand inside. It is all foam rubber. It can't hurt her. It is light. He can swing on it. It will have a little frame he can step on outside.

"Sounds great. How much?"

"I think I can do it for $400."

"You're in."

So I immediately bought it. We had tried a couple of other sources but without much luck.

He built the ball. In short, it looked a little like a foam rubber ball, but it served our purpose.

My point is that it was perfectly adequate for the situation and it was a third the price, or less than a third.

So is that the kind of example?

Q Yes. What do you do with that savings? Where does that go?

A I use it elsewhere, obviously. I don't save it. I am going to respend it on other elements of the production.

That particular week, I can't recall exactly where I used it, but I know I used it.

Q Does this sort of thing happen frequently, this sort of trade off?

A Weekly.

THE COURT: Actually, unless I'm even more naive than I think I am, it seems to me that the process is the same in your business as it is in Government, as it is in most business and as it is in my household, except that I come out with a deficit.

THE WITNESS: You don't have CBS to run to.

MR. TOPKIS: Do you use many foam rubber bells in your house, your Honor?

THE WITNESS: I will sell it to you, Mr.Topkis.

THE COURT: I'll tell you in the robing room.

Q Mr. Wright, as a representative of a packaging company, as an ~~on-hire~~ line producer of a television program, which system do you prefer? The per use system we have just been discussing or the system under which you now operate?

A Well, let me put it this way, Mr. Hruska: If I have more money, to begin with, and can control all the elements of my show, as this ~~in~~ per use system as I understand it to be, allows me to do, I obviously am going to prefer it because I have a greater profit potential, I have greater flexibility in my producing, and I could

control it.

Q Can you think of any reason why you could not work under this system?

A Well, not right at this moment. We are all obviously trying to understand it and trying to explore its good points and its possible pitfalls, but as I understand it, once it is settled down and it is a working mechanism, I see no reason at all why it wouldn't work just like music synch., like I purchase and get bids and buy anything in the open market.

Q Now, Mr. Wright, I would like you to assume these facts.

THE COURT: Before you do that, in view of Mr. Wright's very wise remarks that we were all trying to think this through in answer to the question that might arise, you imply, of course, that you have given some thought to this before you took the stand today, which I think is entirely appropriate.

THE WITNESS: Yes.

THE COURT: Can you tell me how long you have been giving thought to, when you first were approached with, the concept here, and how much time, what sort of thought did you give it?

THE WITNESS: The details of it, your Honor:

I started getting into the details with counsel and the staff about last Friday, I believe it was.

THE COURT: Right.

THE WITNESS: Less than a week.

THE COURT: Had you given any serious thought to the subject before that time?

THE WITNESS: No, not serious. We had a writers' strike. I was aware of the system, period. The name of it, the per use system, and the fact that I would not lose any money, it would be a budgeted item on top of my package, those two things created interest for me.

THE COURT: So, roughly speaking, your consideration has been towards the last week?

THE WITNESS: Yes.

THE COURT: Thank you. All right.

Q I would like you to assume these facts, Mr. Wright: One, the CBS television network cancelled its ASCAP and BMI licenses; two, the ABC and the NBC television networks continued under their ASCAP and BMI blanket licenses; and, three, the CBS television network turned the job of licensing music performance rights over to program packagers, including you, what budget --

THE COURT: Are you also assuming that there would

be a per use license system in existence?

MR. HRUSKA: No. Just a straight by-pass.

THE COURT: I understand.

Q (Continuing) Tomorrow CBS cancels its licenses from ASCAP and BMI and says to program packagers, including the packager of the Carol Burnett Show, and to you in particular, Mr.Wright,"music performance rights is now your baby. We can negotiate a budget, but you obtain it."

Let me ask you a question.

A Okay.

Q Could you operate effectively under those conditions?

A Well, let me clarify something to you so I can give you a proper answer.

Q Right.

A I have been offered no substitute to the system that I have been using. That is, I cannot use the facilities of music clearance --

Q No, no, no. CBS will also say to you, "We will give you whatever help we can."

A I see. All right.

Q Including our music clearance section.

A But they haven't told me how much money that

budget is going to be. I don't know that yet? They just said, "If it costs you more, don't worry about it"?

Q No. They say, "We will negotiate a budget and it will be adequate. It will be adequate" --

A Okay.

Q --"to cover your music costs."

A I am sitting here trying to think where I'd begin.

Okay. It seems to me that I would glean as much as I could from the system I have been using. I would try to find out the copyright owner, which I would think would be difficult. I'm not used to doing that. Okay. Supposing I could find the copyright owner and I'd called him and I'd say, "I want to use your song in the Carol Burnett Show," and he would say to me, "But you cancelled your blanket license, or CBS has, with ASCAP, right?"

MR. TOPKIS: What? Is this a further assumption on the witness' part?

THE WITNESS: I'm asking. I don't know, Mr. Topkis. I'm trying to set up something so I can answer the question.

THE COURT: I am afraid we are getting his thinking process rather than the conclusion. But I don't--

THE WITNESS: Is that bad?

THE COURT: No, I don't know that it's bad. I mean it is not normal, let's put it that way.

What you were asked is whether you would have difficulties, and you are thinking out loud about whether you would.

THE WITNESS: I am thinking out loud because I am going to have difficulty. I am trying to fit it into my working --

THE COURT: You can continue answering the way you were.

THE WITNESS: All right. I will try to keep it brief.

All right. I would get a hold of the copyright ~~writer,~~ I would talk to him and try to make a deal with him. And he says to me -- I don't know where to start. I really don't know where to start. It seems to me that I don't know what to offer him for the song. I would offer him what I think he would get in the performance use under ASCAP. He probably would be quite hostile to me. I would think he would not want to do business with me because he has been -- because my network has taken away an income to him. So he's in a whole new world, too. He's in a new world; I'm in a new

world. Where do we start? We have no guidance.

Q Suppose you call up a music publishing company after you track down the fact that the publishing company owns the copyright to a song you want to use, and you get somebody on the telephone who says, "Well, I've never done this before. I've got to check with my principals. I'll call you back."

A Okay.

Q And let's suppose that happens with respect to two-thirds of the songs -- of the thirty songs you have selected for next week's program.

A Twenty of the thirty songs that I need to get rights to in two and a half, three days.

Q That's right.

A Well, I would say, "All right. Call be back. But it has to be quick," that's all. I have to have an answer in at least twenty-four, forty-eight hours.

THE COURT: In other words, you could afford to, or your staff, involve itself in twenty more telephone conversations, but you would have to get the information on time, is that it?

THE WITNESS: I didn't mean to infer that. I don't see how we could call. We can't, under our system.

THE COURT: That is an aspect of the matter, it

seems to me.

THE WITNESS: I am saying if the call was made, that's what I would say. But I can't conceive of us being able to take over that kind of operation.

THE COURT: Incidentally, is Mr. Hruska's figure of an assumed thirty songs for clearance --

THE WITNESS: Yes.

THE COURT: -- a validly assumed figure? Do you try to clear that many songs for one show?

THE WITNESS: We have cleared as many as fifty-four, I think is our top figure. I would say that is a good average. Twenty, twenty-five, thirty is a good average.

THE COURT: Thank you.

Q Under the present system, within what period of time do you feel that you generally have to know whether or not you can obtain the rights to use the music that you have selected for the program?

A I'm sorry, Mr. Hruska. Would you repeat that?

Q Yes. In today's system --

A Yes.

Q -- as you now operate, within what period of time do you feel you have to know one way or the other whether you can use the music that you have selected for use?

A As I said awhile ago, between two and a half to three days we have got to have ninety, ninety-five per cent ~~clear~~ cleared so that the designers can start to work and we can get the show going.

We can afford to have a couple of loose ends hang over until the following production week, but not many.

Q What happens if more than a couple of loose ends hang over?

A Well, we have substitutes. In other words, we have to meet our deadline, and if we can't get the clearance for a given song or if there are problems, we work it out. Then we don't wait.

THE COURT: When you clear approximately twenty-five songs for a show, does that include a rather liberal reserve just because of the problem that you might not get the music you want?

THE WITNESS: I would say within the twenty-five, maybe there are only two or three, your Honor.

THE COURT: You would expect to use twenty-two or twenty-three, is that right?

THE WITNESS: Unless we have a deadline problem, are close to it, let's say, we are close to the deadline, we might clear two or three as a possibility, to get an

answer quick. But if it's early in the stages we will clear the one we want first. If it gets back or we have a problem with it, then we will have time to solve it.

Q Let's go back to the example where you were in the process of clearing, let's make it, twenty-five songs and let's say fifteen of the publishers who were originally called indicated to you that they had to call you back, and let's assume that those return calls were made during the course of the following day, which would be Wednesday, and let's assume that in ten of those return calls you could not make a deal and for those ten compositions you had to make additional calls.

Would this sort of process create any unusual problems for you?

A To make sure I understand, we are working under the per use system?

Q No. We are now under the assumption that CBS Television Network has no ASCAP or BMI license and they have turned this job over to you.

A And it is Wednesday and --

Q You are on Wednesday evening and you have ten songs that have not been cleared.

A What would I do? I would chew my nails a lot, number one. I guess I -- we would have to frantically

begin thinking of substitutes. I would try to get on the phone early the next day, to New York, which is where those decisions are usually made, and three hours later. I would try to get an answer. If I hadn't gotten it by then, though, I wouldn't think I would have much of a chance to get it ever, and I would start searching frantically for something else and try to clear those.

I don't know what I would do. It seems like an enormous snowballing process. I don't envision being able to get the show designed and into the shop by the week end, which we have to.

Q Do you think you could produce a musical variety program under these circumstances?

A I certainly don't think I could do it on a weekly basis, which is what we have to do.

Q Would it be practicable to increase the duration of your production schedule?

MR. TOPKIS: To do what?

MR. HRUSKA: Would it be practicable to increase the duration of your production schedule?

THE COURT: You mean start to produce earlier than he now does?

MR. HRUSKA: Exactly.

A Instead of a five-day week, you are saying make a six or seven-day week?

Q Instead of a pre-production week, have two or three pre-production weeks.

A No. Financially it is impossible. We cut to the bone as it is. There is no possibility of expanding our schedule. There is no money for it.

Q It is probably obvious, but will you tell me anyway why it is that expanding the schedule will increase your costs?

A Okay. Number one, you've got all of the contracts with all of your staff, which are explicit in the time spent on the job as far as weeks are concerned, the longevity of production. They have to do other things during our highest period, too.

Number two, you've got all of your technicians and your musicians and your dancers, who work by the hour.

THE COURT: I don't know whether you are asking him this for the benefit of the record or for my benefit. If it is for my benefit, I certainly understand why a longer production schedule would cost more.

THE WITNESS: Well, it is this kind of thing --

MR. KRUSKA: It was for the record, your Honor.

But I agree; I think it is elementary.

THE COURT: Even the Judges in the Court of Appeals may understand that.

THE WITNESS: Time is money.

MR. HRUSKA: I didn't say that.

THE COURT: What you just said applies to the Court, too.

THE WITNESS: I'm sure.

MR. HRUSKA: With that admonition, I'll wrap this up very quickly.

THE COURT: It is your money.

Q Continuing under the assumption that the CBS Television Network did not have an ASCAP or BMI license, the other facts that we discussed, what effect do you believe that would have on your ability to get top performers as guest stars on your program?

A The ~~best~~ guest performer has the same problem I do. That is, if I am having difficulty getting music rights and he is a singer, I would think that he would think twice about coming onto the Burnett show and being able to do something that he believes is right for him.

In other words, it is a factor in his decision about whether or not he would come, particularly if the other networks don't have a problem.

THE COURT: At the present time, when you sign up a star, I take it that you do not have to assure him in advance that you will be able to get the music for him that he wants. You perhaps don't even discuss what songs he will sing. Or do you?

THE WITNESS: No. Under the blanket license we never have that problem, of course, because it is --

THE COURT: You can be reasonably sure of getting whatever you want?

THE WITNESS: Reasonably. The synch. rights, of course, we have to obtain. But we usually can negotiate --

THE COURT: When in the process does it occur under present circumstances? Do you sign your guest stars at the beginning of the season or during the course of the season or what?

THE WITNESS: The beginning. The guest star is the first element that we pin down. We know that. Like we are booking already for next season. If the writers' strike is over and we go back to work in July --

THE COURT: You don't clear the synch. rights for Mr. "X"'s appearance until,let's say, a few weeks before he appears, do you?

THE WITNESS: No, we do not. What he is going to do on the show is not determined until just prior to

joining us.

THE COURT: Right.

Q Are you aware, Mr. Wright, of any other business opportunities -- that's a bad word -- available to guest stars of the caliber that appear on the Carol Burnett Show or the Dean Martin Show or other network television musical variety programs?

A You mean what other bookings do they make?

Q Right. That's the word I was looking for.

A The stars that we have on our show are top people. They work just about everywhere in the business. Most of them work on all the television shows. Vegas, one-night stands across the country, night clubs in New York. You name it. If they are big stars, they are wanted.

Q Continuing under the assumption that CBS Television Network cancelled its ASCAP-BMI licenses and NBC and ABC did not, suppose you were approached by the NBC or ABC Television Network with the prospect of those networks, either one of them, buying your program for the next season. What do you believe your reaction would be to that approach?

MR. TOPKIS: Could I have that question back, please, your Honor?

THE COURT: Yes. I would like to hear it, too.

(Question read.)

THE COURT: You mean buying them --

MR. HRUSKA: Obtaining the rights to make network runs of the program.

THE COURT: Right.

A And we are still talking about CBS's not having the licensing. We are talking about by-pass, what has been termed a by-pass situation?

Q Right. What we have been calling in this case by-pass. Exactly.

A I'm sure we would listen very carefully to any deals that they would have to make to us. We would talk to them.

MR. HRUSKA: I have no further questions.

THE COURT: Why don't we take a recess at this time?

(Recess.)

CROSS EXAMINATION

BY MR. [illegible]:

Q Mr. Wright, you were asked by Mr. Hruska a few minutes ago as to what problems you would anticipate if you had to obtain performance rights direct from copyright proprietors in one fashion or another and I understood you to say that one of those problems would be that a copyright proprietor said or would say, "Gee, you walked away from your contract with my performing rights organization," and would feel hostile toward you; right?

A Correct.

Q That's one way.

A Yes, sir.

Q And you said another problem would be finding the copyright proprietor, right?

A Yes.

Q Are there any other problems that you would anticipate that I failed to catch in my notes?

A Well, I alluded to and perhaps didn't make it clear, that time was a problem for me. I foresaw the inability of being able to obtain these rights in my production schedule; yes.

Q The time that the CTN computer that we were talking about would save for you, right?

A Well, any mechanism, any system, yes. The computer is ideal because it is quick. Mechanics were set up under that circumstance.

THE COURT: From what you have just said if I understood you, putting aside the advantage of the computer, is that one of the problems you conceived you might have if CTN advised you tomorrow that it had cancelled this blanket license and wanted you to do the job, is that you couldn't do it within your time schedule.

Is that right?

THE WITNESS: That's right.

Q Now, if under the per use system -- you know what I mean by the per use system?

A Yes.

Q If you called up a member of ASCAP and asked him for a direct quote, wouldn't you think it very likely that he would say something to you like the following or maybe even something less polite:

Quotes, gee, you knocked my ~~society~~ society out of business with a lawsuit, end of quote, and feel slightly hostile toward you?

A If it has been a Court decision and this is the settlement, I think all parties would accept that decision, if there has not been a clear-cut, joint, mutual understandi

of what's going on.

Q Now, this difficulty that you apprehend in finding the copyright proprietor, where would be the first place you would look?

A There are a number of places. The sheet music if you had it.

Q Well, yes, that is one way. Wouldn't a far easier way be to call a fellow named Bernie Brody, who has been working for you for many years?

A Yes.

Q Mr. Brody is in the business of clearing synchronization rights for your outfit, isn't he?

A He is, yes.

Q And he knows the location of just about every copyright proprietor in the world, doesn't he?

A He is a very knowledgeable man.

Q And he has an enormous card index?

A Correct.

Q And he has never had any great difficulty in clearing any synch right for you, has he?

A Well, to me, it's a whole different thing, Mr. Topkis.

Q Just answer my question, if you will, please, Mr. Wright.

A He has not had any major difficulties in clearing synch.

Q Now, have you ever personally cleared a synchronization right?

A I have spoken to copyright owners on occasion there was a special problem involved.

Q If there was --

A A special problem involved.

Q For example, a lyric change or something unusual like that?

A Possibly, or an unusual usage. For example, using the title of a song in a sketch, not musically but just lyrically or something like that.

Q And you never had any trouble finding the copyright proprietor in order to engage in such conversation, did you?

A At that point, the copyright owner was known because the initial clearance had gone through and bounced back to me. I usually come in on it after there is a reject or a problem, so that's known at that point.

Q Right. Mr. Brody has found him for you.

A Mr. Brody or Mr. Fox or whoever.

Q Mr. Brody clears synch rights for you within the time spans currently available on your program, doesn't he?

A He does.

Q Is there any reason that you can suggest why he couldn't do the same job for performing rights?

A Under a bypass system, for the reasons I have just outlined that I would have trouble; he is trying to clear things without the mechanism.

Q He can call Harry Fox, can't he?

A That's not a mechanism. They don't clear ~~program~~ performing rights.

Q They haven't been asked, have they?

A Well, they don't.

Q Well, one possible explanation is that nobody has ever asked them.

A Possibly so, but you have no system.

Q I agree.

A If they have never done it, give him some guidelines, give him an orderly mechanism to do it.

Q A telephone would be it, wouldn't it?

A I wouldn't think so. A telephone isn't enough.

Q Well, we will hear, I believe, testimony from people at Harry Fox in this case.

A Very good.

Q And I am sure you would agree with me that they would be the best judges of their competence.

THE COURT: I'll agree with you. You won't put that responsibility on Mr. Wright.

THE WITNESS: I don't want that responsibility.

Q You said that you were sure that the p[illegible] system wouldn't hurt you if CBS promised you an adequate budget, right?

A I meant budgetarily, financially.

Q Going to direct licensing equally would not hurt you if CBS promised you an adequate budget, would it?

A Well, I have to keep saying, Mr. Topkis, that I am getting the money but I am not getting the system.

Q I understand that, but if Harry Fox could be the system, then you would be happy as a clam, isn't that right? Under either system.

A If a per use system had time to be installed and agreed to by both sides, by all parties, and was workable, sure.

Q Well, you were here when Mr. Sipes testified that the only reason that he could suggest why direct licensing wouldn't work was a disinclination on the part of copyright proprietors to deal, weren't you?

MR. HRUSKA: I object to that. I think it is a mischaracterization of Mr. Sipes' testimony.

MR. TOPKIS: If the witness didn't hear, Mr. Sipes said that.

THE COURT: Mr. Hruska says it's a mischaracterization. Whether Mr. Sipes said it --

Q Can you think of any reason other than a disinclination on the part of copyright proprietors to deal, why direct licensing shouldn't work?

MR. HRUSKA: Could we have it clear, also, that we ~~are talking~~ are talking about by-pass? I think we had the same problem.

THE COURT: We mean a direct license under the present system, that is, with the possibility of a benign existence because of CBS's terminating it, of a blanket license. Do you understand?

THE WITNESS: I think I do, your Honor.

I am vitally concerned again about my ~~timeproblem,~~ time problem, Mr. Topkis.

If there is no system, no mechanism, no way to assure me at least that I am going to not have a snowballing effect of clearance, blockages, and I don't have that assurance in a direct licensing situation, as I see it.

Q If Harry Fox were authorized to deal, to broker performance rights, those problems would dissipate; isn't that right?

A I can't guarantee that.

Q No, I appreciate that you can't. I am not asking you to. I am asking you for your honest expectation.

A Harry Fox is a very reliable organization. ... if all the bugs had been worked out with him, and that I was assured that my operation would be smooth and quick, ...

Q Actually, do you have any role in the clearance of music today other than the occasional situation where you will be called in on a lyric change or the use of a title in a skit, something like that?

A Administratively. I am the trouble-shooter, and I think it is what you would call it, Mr. Topkis. I am aware of the problems.

Q This past week, did you happen to see your show on Saturday night?

A I confess I didn't last ~~Saturday~~ SATURDAY. It was a rerun and I had seen it before.

Q Then I suffered alone.

A Don't say suffered.

Q There was a skit on it about a fireman who was chaffed between his legs.

Does that identify the show for you?

A It will live in my memory for years. Lived in Tim

conway's for a long time too.

Q Was he the fireman?

A He was the old fireman.

Q That show had, according to the listing that I have here, ten featured songs in it. Is that about average for you?

A I feel our average is higher, Mr. Topkis. There was no medley on that show, as I recall.

Q No, that's right, there was not.

A When we have a medley, it shoots high, way up there.

Q Right. Well, I have two others here. The week before you did have a medley and you had four feature use and then a medley of about nineteen songs, as you had twenty-three.

A Twenty-three.

Q And I have got another one, the one broadcast sometime last October, October 4th, where the songs were If I Could Write a ~~Cleng~~ Song, The Wee Small Hours of the Morning, Of Thee I Sing, Indian Love Call, Singing In The Rain, and Raindrops Keep Falling ON My Head.

Do those songs identify the show for you?

A They do indeed. Show 601.

Q Show 601 it is indeed. If you had been presented

with the problem of finding the publishers of those songs, I bet you wouldn't even need Mr. Brody, would you?

A Possibly not.

Q According to this information I have here, the top prices that you paid for a ~~single~~ synch right was $250 for Of Thee I Sing, and the lowest price was $50 for Singing In The Rain.

A That is just about average.

THE COURT: Who sets those prices, the proprietor?

THE WITNESS: The proprietor of the copyright.

Incidentally, the lowest used to be $25. I don't think there is a $25 going now. I may be mistaken, but we can't get them for less than $50.

Q According to these figures that I see here, the lowest price currently seems to be $50, and I don't see one higher than $250 any place.

A The higher than $250 are rare. They are occasional but I think I pointed out the $600.

Q If you are sufficiently ill advised to play Happy Birthday.

~~You~~ You said that your show uses a lot of Broadway show music or uses it from time to time.

A We do.

Q And you spoke of using that great slong, Alive,

from Applause, as your opening number one year.

Could you say "yes" for the reporter?

A Sorry. Yes.

Q What was the date of your opening show that year? Do you remember approximately?

A I don't, Mr. Topkis. It's always the middle of September. It airs in the middle of September.

Q Was that before or after Applause opened on Broadway?

A It was after.

Q Was it more than six months after or just a couple of months?

A I don't really know. My feeling is, and it's only a light recollection, that it opened probably the preceding fall -- spring. I don't know. It may have opened -- it may be that it opened that fall. No, it couldn't have. I don't know.

Q I won't press the point.

Let me put it to you this way, Mr. Wright.

If you had to wait at least six months to broadcast or to tape a song from a new Broadway show, that would interfere seriously with your creative opportunities, would it not?

A Certainly.

Q Now let's come to the testimony you gave about who produces the Burnett show.

As I understand it, you said that Punkin Productions is the packager of the Burnett show.

A Correct.

Q What role does Bob Banner Associates play?

A There is an evolutionary thing which I will have to explain in relation to that question.

Bob Banner Associates was the initial co-producer of the Carol Burnett Show when it began in '67.

The ten-year contract between Carol Burnett and Bob Banner Associates ended in 1972; the end of the television season of '72.

Q '71-'72?

A Correct. In other words, after our fifth broadcast year.

Since my company was an original partner and I had become involved with the show, my personal services had become very involved with the show, it was decided by all of us that even though our contract was over, Bob Wright would remain with the production, since he was part of the original.

But, Bob Banner Associates no longer has a stake in the show; that's over. Therefore, a new company was

formed to produce the show and that company is Punkin Productions, owned by Carol Burnett and her husband, Joe Hamilton.

In essence, I am being loaned out to the show from my parent company.

Does that answer your question?

Q Yes, it does.

A For that reason.

Q I suppose, you identify Joe Hamilton as executive producer?

A Correct.

Q We had some query before as to what the job of an executive producer was and now we seem to know.

A He is the policy man.

Q I see. He is also a composer, isn't he?

A Yes.

Q He wrote Carol's theme?

A Yes.

Q He is a member of BMI?

A Correct.

Q Do you have any idea what he draws from BMI annually?

A I wish we knew more than we did. We have had problems with it in the past and we get reports late and

we had to do a search on it.

Q From that notoriously inefficient organization, BMI?

A We have had some problems with it.

MISS KEARSE: Can I claim a personal privilege?

Q Would you expect that if approached properly and courteously and graciosly, Mr. Hamilton would, by any chance, be disinclined to deal with you for any of the music that he personally wrote?

A That is unlikely.

THE COURT: You mean for use on this show?

THE WITNESS: That is what I presume he means.

Q Actually, in terms just of a head count of the number of compositions appearing on the average Carol Burnett Show, more than half at least are within the repertories of publishing companies owned by Miss Burnett and her husband, aren't they? I have in mind specifically an enterprise called JoCar.

A And Burngood. Our own staff writers, who write specifically special material, we publish their things through those two companies.

Q JoCar and Burngood?

A That's correct.

Q And JoCar and Burngood belong to what performing

rights organization?

A Burngood is ASCAP and JoCar is BMI.

Q So that you have got three staff writers on the show, right? Those people who collect between $1,800 and $2,500 a week?

A Correct.

Q Or a program, it was. For twenty-four programs?

A Per program.

Q And they are also members of either ASCAP or BMI?

A Yes.

Q And they, today, in consequence, every time some of this special material that they create is broadcast, either originally or on rerun, they are paid accordingly by ASCAP or BMI?

A That's right.

Q Do you have any idea what the income of those people who make $1,800 to $2,400 a week from you is from either ASCAP or BMI?

A I really don't. I know it is, they make a few hundred, perhaps a thousand.

Q You just don't have the figures?

A I don't know.

Q Incidentally, the Punkin Productions, I suppose

has a contract with CBS to produce the show?

A True.

Q How long does that contract have to run?

A Annually.

Q Has it been renewed for next season?

A Been renewed.

Q Happy, happy.

Does Miss Burnett have a contract of longer duration with CBS?

A Not any more.

Q Does your parent enterprise, Bob Banner Associates?

A We have no existing contracts with CBS other than for individual specials.

Q Do you have an equity interest yourself in Bob Banner Associates?

A I do.

Q Does Bob Banner Associates from time to time sell programs or package them for various networks?

A He does.

Q No. Bob Banner Associates, the business.

A I am sorry. The Company. The company, it does. I beg your pardon.

Q You said when you were talking about Alive, the

song from Applause, that the publisher had given you an advance copy. Do you remember that testimony?

A Yes, I said that.

Q What did you mean by an "advance copy," Mr. Wright?

A Well, as you know, we, before it was actually published and sometimes this happens right after the Broadway opening, when they don't know if there is a hit or sometimes it happens during pre-Broadway, a hand copy, version, of the song is sent out to perhaps interested parties. On this particular incident, I believe because of our, one of our staff's personal friendship with Comden & Green, I believe that was sent like because it was an old-friend kind of thing, early in the summer, as a possible use in the fall for the Burnett show. Since that was our first show, I am sure that we had it for awhile. That's why I keep thinking that, when you asked me about when it had opened, it seemed to me that it had been opened awhile because we had had that music in our hands for awhile.

Q If I remember rightly, Applause opened in April but I could be wrong.

A Well, then my first instinct to say spring perhaps was right, then.

Q When in the normal course would you have taped this opening show for the season? A couple of months before?

A No. We tape much closer to air date. We would have taped it late August.

Q You testified that if CTN came to you and said, "Play the following song on next week's program," you wouldn't take it kindly.

A That's right.

Q I suppose that might vary with the identity of the CTN employee; isn't that reasonable enough to say?

A Well, let me say this -- the mood of the answer might vary.

Q Even Dr. Stanton or Mr. Paley might get it?

A We would be very polite to Dr.Stanton, Mr. Topkis.

Q Just so that I may check our records, could you tell me who are the three writers currently under contract to Punkin?

A Certainly. Ken and Mitzi Welch. Now, that's a team, so in my mind I think of them as one. It's two people but it's one unit.

Arthur Malvin, and Peter Matz.

THE COURT: Are those composers or lyricists or

general -- do they do both or what?

THE WITNESS: It's a collaboration, your Honor. They individually have their own forte. The husband-wife team are music and lyricists. Mr. Malvin writes a combination of special material and putting medleys together, weaving of the songs to make an interesting medley.

Mr. Matz is our orchestrator, so he writes the orchestral arrangements and orchestral specialties.

Q And as I understand it, in return for paying them $1,800 to $2,400 a program, you receive, you, Punkin, receive from them the synch. right and all rights in the compositions that they create?

A That is correct.

Q And they retain a right to receive such distributions as their performing rights societies might distribute?

A Yes.

Q And the compositions are published by one or two publishing houses owned by Miss Burnett and Mr. Hamilton and those publishing houses are affiliated with either ASCAP or BMI? Right?

A That is correct.

Q And those publishing houses also receive dis-

tributions?

A That is correct.

Q In your experience, Mr. Wright, are such arrangements commonplace in television? That is to say, as to people who write special music, whether it be special music of the kind that you have just described, or theme or background music, are the arrangements typically the same? That is to say, the composer or creator is paid a sum for doing the act of creation and assigning the product to his employer, reserving the distribution rights and, reserving the performance, a right to share in the performance rights and the producer then assigns the publisher's interest to the publishing company with which the producer has some connection?

A I would say in my experience, that this is one of the accepted practices of the industry, yes.

THE COURT: Accepted?

THE WITNESS: Accepted.

THE COURT: In other words, normal or relatively so.

THE WITNESS: It is one of the normal ways of doing it.

THE COURT: Would somebody illuminate for me just what kind of distributions such persons would get

from ASCAP and BMI under the circumstances you described?

MR. TOPKIS: Certainly, your Honor.

So far as ASCAP is concerned, we maintain a census of every bar of music that goes out over network television and that is fed into our computers --

THE COURT: I understand that but, since you said "Share in the performance rights," how does that work?

MR. TOPKIS: ASCAP will allocate a sum of money for distribution pursuant to the television network performances. That sum will be divided into equal halfs, as most halfs are -- half for the publishers and half for the writers.

Got it?

THE COURT: Yes.

THE WITNESS: May I say this, your Honor, along that question, pertaining to it, the distribution system comes out quarterly, I believe. Am I not correct?

MR. TOPKIS: Distributions are made quarterly by ASCAP, yes.

THE WITNESS: And we get them quite late. We get them like nine months to a year later.

THE COURT: "We" being whom in this case, Punkin or JoCar or --

THE WITNESS: "We," being Jocar and Punkin and also my writers have told me that they have a similar experience.

I don't get the reports but they have told me that they get them about when we do.

We have, in the past, had discrepancies between this half-and-half thing and we have had to do a great deal of research in trying to discover why they were not the same; they should have been and it's been a very complex, difficult situation to deal with. I just wanted you to know that.

MR. TOPKIS: I may say, your Honor, that Mr. Wright is absolutely right. It does take typically nine months, I believe, for our distributions to be figured out and the surveys analyzed, the distributions figured out and the payments made.

Q Have you ever heard, Mr. Wright, of something called a per program license?

A Only what has been discussed in the courtroom and told to me briefly by counsel.

Q You have been here throughout this trial?

A Through most of it, yes.

Q I won't bother to take up your time any further with it.

Let me ask you if you would envisage any difficulties in operating under a combination, under a per program license combined with direct licensing.

That is to say, a situation where you would endeavor to get direct licenses for all of the compositions on your program and if you failed you could forget about those direct licenses and avail yourself of the per program license.

A Well, from what I have heard, I would have to say, it's much too involved and complex for me to accomplish all of that without more done up front, without a basic system that is more all-inclusive and you don't have to do double work.

It's got to -- I am bothered by the complexities of getting the job done.

Q Well, if we may assume that the Harry Fox Agency could perform for performing rights the same service that they perform for synchronization rights, making that assumption with me, and that is the one assumption I ask you to make, do you envisage any difficulty in operating?

A Well, what about my budget? Now, again, I don't -- if I am responsible now for all of it, the financial end of all of the musical performance rights, what about

this problem of getting all or nothing and you pay or you don't pay?

I can't afford to pay for things twice or gamble --

Q Nobody is asking you to pay for things twice.

Let me ask you about the way you deal in synchronization rights today. As I understand it, in licensing synchronization rights today, you obtain bids through the Harry Fox Agency on all the songs that you possibly want, is that right? That's step one.

A Most of those are predetermined, of course.

Q Bernie Brody, on your behalf, calls the Fox Agency and gets quotes, right?

A But they are there and those quotes are in existence.

Q Actually, I think you were wrong, sir, and I ask you, do you know that of your own knowledge?

A I know that it is an accepted system that I have, through the years, used, and I know what to gauge on what things will cost.

In that respect, yes.

Q What would a synch. right for the Ladies Who Lunch cost?

A I couldn't tell you. You have it in front of

you. Why don't you tell me? I don't remember.

Q I am just testing your assertion that you know what things cost.

A I am talking about the system. I know it's $50, $100 and $150. I know the range. I also have an overall feel and I know what collectively my budget for synch. rights is. It's been in practice for six years.

Q So you are a little nervous about going off into uncharted areas?

A Unless there is a firm, solid, predetermined mechanism set up for me to use.

Q Well, what is it about the per use world that Mr. Hruska postulates for you that makes you less nervous about that than the direct licensing world?

Is it that computer with the printout in your office?

A Yes, that's very --

Q Suppose we gave you a computer with a printout in your office? Would you be just as happy?

A As long as all the other things are there with it, sure.

Q Suppose CBS gave you a computer with a printout in your office, gave you one for per use and one for direct -- wouldn't you be happy, as happy with one as with

the other?

A I don't need two. One is fine.

Q When you are licensing synch. rights, am I correct in suggesting that you obtain quotes from the Fox Agency and only after the show has actually been taped do you advise the Fox Agency of which songs you taped and send them a check for it through Bernie Brody?

A I don't think so, Mr. Topkis. Let me put it this way -- timewise, because of our time, we are getting those bids. We are collecting our financial information. Because of the time lag, the papers may not have been sent back. I don't get a contract for a given show assigned on a music synch. license system for three weeks after it's been taped, but the deal has been made and Fox knows I am going to use it, so I don't get what you mean.

4A

THE COURT: I take it in the use of music like this, where it is not an exclusive use anyway, you are not obliged to let Mr. Fox know by such and such a day whether you are going to take it or not, or such and such an hour, are you?

THE WITNESS: Of course not.

THE COURT: You can still do somebody else's?

THE WITNESS: There is nothing exclusive about it. It is something I have to have, that's all.

THE COURT: And, of course, you let him know. On the other hand, when he is quoting a price to you, I assume that customs of the industry are that you can count on that price?

THE WITNESS: Absolutely. I've never known it to be reneged upon.

BY MR. TOPKIS:

Q In point of fact, let me show you what I've marked as AX 180 for identification. The top sheet of that appears to be a letter from Mr. Bernie Brody to Alan Finell of the Harry Fox Agency, dated July 21, 1972?

A Right.

Q And he writes to confirm quotations given by Al Berman.

A Correct.

Q Al Berman runs the Harry Fox Agency, right?

A I believe so.

Q Yes. And that letter is dated July 21, 1972.

A Right.

Q And that show was broadcast October 4, 1972, wasnt it?

A It was.

THE COURT: The letter is dated July 21st?

MR. TOPKIS: The letter confirming the quotes from Brody to Harry Fox says you quoted these prices, and he has a string of prices.

Does your Honor want to take a look at this?

THE COURT: I want to get the relationship of the time you are trying to bring out.

MR. TOPKIS: Right.

THE COURT: If I understand this correctly, this in July specifies quotes for a show to be used in October.

MR. TOPKIS: Right.

THE COURT: Okay.

BY MR. TOPKIS:

Q The next thing that happened was that the show was taped and broadcast and then payment was made.

A Well, what you are missing here is when the show was taped. The show was taped probably --

Q In September?

A No. On this particular one we taped it around the time of this letter. I don't have my schedule.

We try, as I explained, to tape close to air date. Jim Nabors, who was our guest on this show, I believe, was only available at this time, and I believe we taped it, Mr. Topkis, around this July 21st date. Before or after, I would have to look.

Is this a Monday? Do we know what day of the week the 21st is, of '72?

Q I will in a second.

A Okay. Maybe I can give you an answer.

Q We will in a second, if your eyes are better than mine (handing calendar).

A Okay. July 21, '72, right?

Okay. That is a Friday. That is the day we taped it.

Q Okay. Fine.

So you've got your quotes then on the Friday.

A Well, he's been getting it on the telephone.

Q He confirmed it.

A He is confirming it.

Q That's the way it worked, isn't that right?

A That's right.

Q Brody calls Fox, says these are the quotes, and then got the quotes and then wrote him a confirmatory letter.

A Yes.

Q And only long after the show went on the air does Brody send Fox a check and say, "Here. Please send me the licenses."

A For a very good reason.

THE COURT: Let me in on it, please. When? You keep saying "long after." But to what are you referring?

MR. TOPKIS: The show went on the air on October 4th.

THE WITNESS: Correct.

Q On October 23rd Brody writes Finell at the Harry Fox Agency and says, "Here's the checks. Please send me the licenses." Right?

A Yes.

THE COURT: Okay.

Q It was a handshake deal, and people in the industry live up to handshake deals.

A Of course. But may I explain why this system is used?

Q Please, sir.

A We never pay cut on materials that can be physically edited from the show until after the air date, and this is also accepted practice in the industry.

Q Right.

A Certainly we have a deal. But we are not going to pay it when it is taped when we could decide two days before that airing that there has been a national disaster and CBS says, "Cut five minutes out of your show." We may cut out a piece of music. It just saves accounting problems if we don't pay until we know it has actually been on the air.

Q So what you have gotten from the copyright proprietor through the Harry Fox Agency is a quote which you are free to accept or reject, and you accept it by actually performing it, right?

A By actually taping it under those terms.

Q Right. Today, Mr. Wright, the question of performing rights never enters your mind when you set out to decide on what compositions you are going to perform on your show, is that correct?

You know that CBS has an ASCAP blanket license, a BMI blanket license, probably something from Sesac if you ever use Sesac music.

A Let me put it this way: it enters our mind because

it still has to be cleared. But did you say the cost of it, Mr. Topkis?

Q No, I say the whole question of performing rights just doesn't enter your mind because you know that CBS will take care of that?

A Oh, yes, it enters our mind.

Q Performing rights?

A Oh, yes. We still have to clear the music.

Q And how do you do that, sir?

A Through the CBS clearance department.

Q So that before you tape a song you make sure that CBS has the performing right for it, is that right?

A The Bernie Brody synch. license and the CBS music clearance mechanism is performed simultaneously. That is, we feed music titles to both the CBS music clearance and Bernie Brody and they are very detailed, how we are going to do it, what we are going to do, how many bars, what the set is. Yes, I would call that a performing right.

Q All right. That is CBS' problem, though, and you regard --

A We give them the information.

Q Right. In any event, so far as performing rights are concerned, you do not let your decision as to what song you want to use and what song you initially select to use be affected in the slightest by whether or not the performing right is freely available?

A I would say that's an accurate statement.

Q So that your selection universe embraces all music of which you are aware.

A Yes.

Q As a creator, would you feel that your creativity was in some degree trammeled if that availability was shrunk and monetary considerations intruded?

A I have thought about that, Mr. Topkis, and this is something we all have to think about in the system, and I have got to tell you that the answer is no, for me, and I will tell you why.

I have a staff of people who are used to me saying to them, "You can't do it. It costs too much." We operate a business, and in operating a business we are conscious of the cost, and the creative side many times takes precedence and we will make room for that creative side, particularly if I have a lot of money, more money than I've got on top, to be flexible with. That's why this appeals to me.

Q And when you want Arnie Rosen to write scripts for you, you wanted him because you thought he was the finest script writer you could obtain, right?

A Absolutely.

Q And you were very glad that CBS made the

additional money available to you to acquire his services, right?

A I was.

Q Aren't you equally glad that the music of Cole Porter, Richard Rodgers, Irving Berlin, George Gershwin and Steven Sondheim is freely available to you without consideration of cost?

A I am delighted, but I don't see that that is going to be absent from the new system.

Q Well, it depends upon which new system you have in mind.

A Reservoir with options, with pull-out options.

Q Well, if Mr. Sondheim, Mr. Rodgers, Mr. Porter, Mr. Berlin and whoever else I mentioned, all exercise their options to pull out, you would be looking for their music and not finding it, isn't that right?

A Then I will call and I will bargain with them, like I do with the other elements of my show.

Q And you might or might not succeed in your bargaining with them?

A Of course.

Q And if you found that your budget was a little high this week on sets and decor, you might find that you were playing someone other than Steven Sondheim?

A Or I would play Steven Sondheim and borrow from next week.

Q And there would also be a possibility, I take it, that Mr. Sondheim or any of the others might just say "No."

A There is that possibility now.

Q Oh, no, sir. That is exactly the difference. There is not that possibility now. You know that.

A Not under your system. I am talking about other sources of Sondheim.

MR. TOPKIS: I have no further questions. Thank you, Mr. Wright.

THE COURT: Miss Kearse?

CROSS EXAMINATION

BY MISS KEARSE:

Q Mr. Wright, do you run the JoCar Publishing Company?

A Do I run it?

Q Yes.

A I do not.

Q Do you have any connection with the ~~coperation~~ operation of that company?

A I do.

Q Do you know whether or not JoCar received the

notice of the pendency of the present action?

A I don't know that. Our business affairs people probably would have that information.

THE COURT: Is JoCar a named defendant or are you just talking about as a member of the class?

MISS KEARSE: As a member of the class.

Q Do the people who run JoCar report to you?

A No. It is a joint feeding of information of solving problems and making the thing work. Mr. Hamilton is probably the final decision maker on Jocar decisions. I am involved.

Q Now, you stated earlier that you have had some trouble getting reports, timely reports, from ASCAP and BMI at JoCar.

A Yes.

Q Did you say also ~~thatyou~~ that you had some complaints from the writers about that?

A We had some discrepencies, Miss Kearse, which we were trying to find out why they were there, trying to understand the complex system under which payments are made, trying to fill out the right forms. I must confess to you we went through three or four different versions of how to fill out forms and it was driving my staff up a wall, because one person in BMI or ASCAP told us one

thing. we did it that way for awhile, and pretty soon, when we said, "Okay, why isn't so-and-so registered?" "Oh, you weren't supposed to do it that way."

Well, we had trouble getting decisions on how to operate. We finally hired a counsel, Mr. Raymond Lee Kahn, who is affiliated with Executive Business Management, who are our business affairs people, and Mr. Kahn looked into it in depth to try to work out all of those problems: One, lateness of information; two, how we were to operate in feeding BMI and ASCAP information; and, three, discrepencies in payouts to publisher and artists.

Q By the way, are you an officer or director of JoCar?

A No.

Q Do you have an equity interest in JoCar?

A I have no monetary interest in JoCar, no. It is part of my supervisory duties within the Carol Burnett Show umbrella. I am paid for my work on the Carol Burnett Show, and in that, that is part of the Carol Burnett Show, I work in --

Q I didn't hear the end.

A That company is part of the Carol Burnett Show operation. I supervise our side of it.

Q By the way, are you a composer or an author?

A No. Would that I were.

Q You also spoke earlier of an assumption I believe you made that if CTN cancelled its ASCAP and BMI licenses and you tried to obtain licenses directly from writers and publishers, that you would encounter hostility on the part of writers and publishers, do you recall that?

A I do.

Q Have you spoken with any writer or publisher on that subject?

A No. But I have to put myself in his position, and I used that word because that's the way I would react were I in his shoes.

Q But you haven't spoken to anyone about it.

A No.

Q Any writer or publisher, that is.

A No.

Q Assuming ~~assuming~~ that there were such hostility, would you think that you could mitigate it so by making more timely payments than your writers seem to receive from ASCAP and BMI?

A I don't follow that question. I'm sorry.

Q You have stated that your writers have had some trouble receiving their reports from ASCAP and BMI.

A Yes.

Q And that you --

A JoCar, too. The publishers, too.

Q The publishers, also?

A Yes.

Q Suppose you were to attempt to enter into direct licenses with writers and publishers, do you think that by promising prompt payment for their performances you might be able to overcome some of the hostility which you assume exists?

A I don't think that that has anything to do with it. It isn't the case of payment. It is a case of ingrained attitude and loyalty to a forty-year-old organization.

Q That comes from putting yourself in their place?

A I am not in their position, speaking as I feel they would. I'm trying to ~~presolve~~ resolve my problems or at least confront them by putting myself in my opponent's position here, and to me it is untenable.

Why should he want to deal with me?

Q Perhaps nine months' worth of payments.

A But that's not what I would offer him under the by-pass, right?

Q You wouldn't offer to pay him promptly?

A You mean as soon as I make the deal, sure. I would pay him right up front. But, remember, that's a very small portion of his income. That would mean nothing to him, I would think, one performance on the Carol Burnett Show.

THE COURT: You wouldn't pay him for nine months anyway.

THE WITNESS: Right. I would pay him for one little performance, not for nine months.

Q I'm sorry. I actually meant nine months' use of the money.

A Well, if it's six hundred bucks, that to him can't be that important. I -- if he is a major publisher, that would be a drop in the bucket. I don't think that would be of any import.

Q If he is a major publisher, wouldn't you assume that there would be many performances of his compositions?

A Of course.

THE COURT: You mean of compositions which he has the right to publish, is that right? We are talking about a publisher as distinct from a composer at this very moment, right?

MISS KEARSE: Yes, compositions of which he has

published.

THE WITNESS: Or copyright owners, if you will.

THE COURT: Copyright owner.

Q So that we are not talking just about the $600 that you would pay him for one performance but we are talking about all that he would expect to derive as payments under direct licenses.

Now, wouldn't you expect that receiving prompt payment for those performances might be an adequate inducement?

A No, I don't, Miss Kearse, for this reason: It isn't all that a lot of money, because you only have the CBS Network and you have only got two variety shows this season. It is a small drop in the bucket compared to all of the other performing rights on the other networks, on the other media. I don't think that would be that influential.

Q Wasn't that enough to get JoCar to hire a lawyer to protect its right with BMI?

A No, ma'am, it was not. That was a year's accumulation, not one performance or not a few individual things. That was a year's accumulation, perhaps two in some cases, and it involved not only JoCar, it involved the writers who also wrote under the JoCar label.

THE COURT: Is that still pending?

THE WITNESS: Sir?

THE COURT: Has that been settled or is it pending?

THE ~~COURT:~~ WITNESS I think we have pretty well got it ironed out. I think we got our money.

Q I'm glad to hear it.

Mr. Wright, I would like to show you a document which has been marked BX161.

THE COURT: Have we gotten --

MISS KEARSE: Which I would like to offer it in evidence.

THE COURT: I think you have had your opportunity, Mr. Hruska.

MR. HRUSKA: I certainly have. No objection.

THE COURT: All right. Received in evidence.

A Explain this to me, what this is.

Q Let me get it marked into evidence first.

(Exhibit BX-161 was received in evidence.)

xxx

MR. HRUSKA: May I raise just a point of order? I said I have no objection to the document being received in evidence. Are we going to have documents received, defendants' documents, received in evidence during the plaintiff's case in chief, or shouldn't

we wait until defendants begin their case and have documents by them received?

THE COURT: I don't see any reason to wait. It may be quite relevant to put a document in evidence so that questions can be based on it in the plaintiff's case, even if it is on cross-examination by the defendants. So I would say the answer is yes, I will allow it, putting defendants' documents in evidence in the course of cross-examination of this witness.

MR. HRUSKA: I would object to that system, your Honor.

THE COURT: Why?

MR. HRUSKA: Simply because I would like to see the defendants have a case to be put in at a point in time after our case is put in, including the admission of their documents. It is -- I am simply noting my objection.

MISS KEARSE: We will have something left for our case.

MR. HRUSKA: I'm not entirely sure of that.

THE COURT: The faster we move along with the plaintiff's case, the sooner we will get to the defendants'. But I can see no reason not to allow any document to be put in in the normal course, which is my universal

experience.

Okay, Miss Kearse.

Q Mr. Wright, this document has been identified as portions of a contract between CTN and the producer of the Ed Sullivan Show. I would like you to look at the provisions of this and tell me, if you can, if similar provisions appear in your contract with CTN.

A I'll try.

(Pause.)

THE COURT: I don't know whether it is relevant, but that is a contract as of July 1970, is that right?

MISS KEARSE: Yes, your Honor.

A '70?

I really can't state, Miss Kearse, whether or not it is in our contract. I am unaware of it if it is.

Q Are you aware of any provision in your contract which relates to indemnification of CTN for performances which are not licensed through BMI or ASCAP?

A I am not aware of whether or not it is in there.

Q Did you participate in the negotiation of the agreement with CTN?

A For which agreement?

Q For Carol Burnett's show.

A Are you speaking of the original 1967 or the negotiations that have occurred since then? There have been many negotiations since.

Q Well, did you participate in the first one?

A I only gave information to the first one. I was not a party to the actual meetings. I was aware of what was going on.

Q Have you participated in any since the first one?

A I have been more of a participant in the last one, when Carol's ten-year contract was over, which I explained earlier, last year. I was more involved in that negotiation for this season and next.

Q Did you read the agreement that was finally signed?

A I have never read the final agreement.

Q Do you have any understanding, Mr. Wright, as to whether it is CTN or Punkin which bears the risk of infringing performances by CTN on the Carol Burnett Show?

A I don't --

THE COURT: Miss Kearse, may I ask whether you

are in this line of questioning trying to determine what Mr. Wright knows or what the facts are?

MISS KEARSE: Well, I am trying to determine what the facts are --

THE COURT: Why can't we just get CBS to give us the facts on that, either by contract or by serving them with an interrogatory?

MISS KEARSE: If they will produce the contract, I would be extremely happy, your Honor.

THE COURT: They are free to argue it is not relevant, of course.

MR. HRUSKA: That would be my initial ~~taok~~ take on it, your Honor, right.

THE COURT: We can discuss that en famille, but I don't see any point in taking Mr. Wright's time to question him on it if he is not really --

A It is not my area. This, of course, is a legal business affairs area. We have people who do that.

MISS KEARSE: I was also trying to get at Mr. Wright's knowledge.

THE COURT: That is another question.

THE WITNESS: Fine.

Q During the first half of 1970, Mr. Wright, were you asked by CTN to obtain music performance rights

from BMI affiliates?

A From BMI affiliates. In other words, from your organization. To obtain --

THE COURT: From -- they call affiliates members in ASCAP.

Q Writers or publishers affiliated with BMI.

A For what purpose?

Q For the purpose of having the performing rights.

A For what? You don't obtain it unless you are going to use them for something.

THE COURT: For your own use, I suppose.

Q For use of music on the Carol Burnett Show.

A All right. We always obtain rights for the music on the Carol Burnett Show, and I wasn't asked then, any more than I am asked now. It is routine.

Q No, I don't think you understand my question.

A I guess not.

Q My question related to performing rights.

A Performing rights? I'm sorry.

Q Performing rights.

A I have never been asked to obtain performing rights.

Q Were you aware during the first half of 1970 that CTN had no music performance rights from BMI?

A I was not aware of it at the time.

Q During the first half of 1970 did you submit compositions which were in the BMI repertory to CTN for clearance?

A We did.

Q Were you informed by CTN that they had performance rights to those compositions?

A I was neither informed or not informed. We continued the policy that we were operating under in the fall. There was no change, if that answers your question.

Q Were you informed by CTN that CTN did not have performance licenses from BMI?

MR. HRUSKA: I object to this line of questioning. It is irrelevant, I believe, and it is getting late in the day. That entire subject was settled in the BMI motion for preliminary injunction.

THE COURT: You are certainly right that a very important settlement occurred, or whatever you want to call it. At least there is a court order on this subject which has settled it for the time being.

But there remains, of course, the relevance, or whatever it may be, of CBS' opportunity to, as alleged by BMI, and failure to attempt direct licensing

during that period.

I must say, however, Miss Kearse, having given you a Brownie point for that, that I don't understand what difference it makes what Mr. Wright knew about it at the time, once we understand that he knew nothing about it. I mean, as I understand it, he knew nothing about it, he was never asked to do anything about it. Isn't that what you are trying to establish?

MISS KEARSE: Well, if that's the fact, I am certainly trying to establish it.

THE WITNESS: May I say this --

THE COURT: He said so.

THE WITNESS: Though I knew nothing about it, that does not mean that the business affairs department of our organization and the business affairs department of CBS had not discussed it. But I am not privy to that knowledge.

THE COURT: Anyway, as I understand it, what you were saying, Mr.Wright, you never knew at the time?

THE WITNESS: Exactly.

THE COURT: That there were no rights on CTN's part and you never heard that your organization was asked to do anything different from what it always

had done?

THE WITNESS: Exactly. Since that operation is my jurisdiction, I was -- there was never any change asked to be made by me.

Q With respect to occasions when your writers want to change the lyrics of a composition --

A Right.

Q -- will you tell us how that works? Who gets in contact with whom for that?

A Certainly. We first of all submit the change through the channels, through the system. That system --

Q By "the system," what are you referring to?

A The system is this: Bernie Brody for synch. license, CBS clearance for normal network program.

If it clears with that understanding, and that is, if it is fed into the system and from that point it goes to Mr. Fox, to the publisher, whatever occurs, then it is solved. But we have fed them specific information on the lyric change. If it bounces back to us, and the music clearance department and/or Bernie Brody calls and says, "Hey, you can't do that. They really don't want you to change that Cole Porter lyric," we then will get on the phone, call that publisher,

explain tc him why we feel it is not damaging to him or try to understand his viewpoint, and we negotiate it.

Sometimes after hearing straight from us without an intermediary, we can work it out and sometimes not.

Q How frequently does an occasion such as this arise?

A Our lyric changes are fairly frequent. I would say at least every other show we have a minor lyric change of some kind, maybe not that often. Maybe one out of three shows.

Q Have you ever had any difficulty in reaching a publisher in order to discuss a proposed lyric change?

A No, because the system works.

Q In other words, you have the name and address of the publisher, so that you can always reach him?

A That information has long been established through the channels that exist and have been tried and true. And so, if it's fed back to us, we know what to do and we can do it. The machinery is there.

Q The information that you would use, then, is in Mr. Brody's office?

A It could be Brody's or it could be CBS music clearance. It can be either one.

Q Do you ever deal with the publisher in question in obtaining synchronization rights?

A That is much rarer. Usually, when Bernie calls and says, "Hey, you got a problem. It is going to cost you four hundred bucks," we don't mess with him. We take his word for it and change it, unless it is very vital to us.

Now, the Happy Birthday -- I keep going back to it. I know there are other examples, but we have on occasion, yes, gone to a publisher.

Q And on those occasions have you learned the whereabouts of the publisher from Mr. Brody's office?

A Of course. He has been talking to them.

Q Has Brody ever reported back to you that he couldn't locate a publisher?

A He's had some problems, either not locating them directly or trying to get a hold of them, trying to get them to answer the phone or a representative to deal with. It happens. Summer, people on vacations, and they don't leave authority to take care of our emergencies.

Q Those situations are rare, aren't they?

A I would say they are.

Q Have you ever gotten the address of a publisher from the CTN music clearance department?

A I think our organization has.

Q Mr. Wright, would you go over again briefly for

us, if you will, just what synchronization rights are?

A My answer will be in the context in which we use them on the Burnett show.

We must buy a synch. license or we don't have the right to rerun the Carol Burnett Show in the U.S.A. musically or run it in foreign countries. It is principally for the right to use that music on our tape in foreign usages and in the second, third, and fourth reruns in this country.

Q It was my understanding that synchronization rights dealt with the recording of the tape rather than the playing of the tape. Am I incorrect in that?

A Well, that's what it started out to be many years ago. Hence the word,"synch.," s-y-n-c, synchronization. The video tape usage, many things have evolved since then. We still use that term.

The point is that all of those elements are put together in a different fashion. But it is still synchronized on that tape. So in that sense it is, yes, a recording.

THE COURT: But within the industry now, as I understand it from what you have just said, even if you tape a show, you don't need synchronization rights if you have performance rights and you only give the show that

one time, is that right?

THE WITNESS: Or in another way, your Honor, if I may. You don't need synch. rights if you know your program isn't going to be seen foreign, and you know it is not going to be repeated, which is the same thing really.

THE COURT: Right.

THE WITNESS: But we would not buy, for example ---

THE COURT: So although it originally arose with regard to performances that by definition were taped, that is no longer the defining characteristic?

THE WITNESS: I think, film. It started in the film industry.

THE COURT: Film.

THE WITNESS: Yes.

MR. HRUSKA: Your Honor, there is a rather longish explanation of the area that your Honor has just gone into. I don't know whether you would like to have it now, probably not.

THE COURT: I wouldn't like to have it now. But I think we ought to have something solid on that in the record before we finish.

MR. HRUSKA: All right.

THE WITNESS: It is evolved and it has evolutionized.

THE COURT: I am not asking for commentary at the present time. I am just trying to pick up what we can.

MR. HRUSKA: I just didn't want to leave your Honor with the impression that what your Honor had just stated was a complete picture.

THE COURT: Rarely what I state is.

MR. TOPKIS: Sometimes it is the final one.

THE COURT: It won't be in this case.

BY MISS KEARSE:

Q Mr. Wright, you spoke about your belief that you could operate successfully under the CBS proposed per use system.

A Yes.

Q And I believe you said that you had received certain assurances. Will you tell us what those were?

A Certainly. I believe Mr. Sipes referred this morning to the fact that he had phoned me once and we had talked in person, and it was the initial phone call. At this point I was generally aware of this system, and at this point in the phone call I believe is when he first mentioned specifically the per use system, and in our discussions he said to me, "What will happen is that it will create a new budgetary element which will be an addition

to our package. We will budget it out, and any expenses that are incurred in payments by you as the packager for the system will be added to your package."

And that was the essence of my conversation with him. It was about the money side of it, which was my first concern, of course, because that's the obvious thing you back away from until I saw that I would have more to deal with.

Q Prior to that telephone conversation with Mr. Sipes, you say you were aware generally of the per use proposal?

A That's right.

Q How had you become aware of that?

A I was first aware when Mr. Jerry Rubin, who is vice-president of business affairs, Hollywood, who works under Mr. Sipes, called me and asked me if I was aware at that point of the litigation proceedings and the problem that was between ASCAP, BMI and CTN.

I had at that point general knowledge that there was a problem, and he asked me if I would speak to a gentleman from New York about the details of a system that they were contemplating using.

Q Did he identify the gentleman for you?

MR. HRUSKA: I object, your Honor. There is no

mystery about this and I ought to make a statement right here.

In preparation for the trial of this case it occurred to me, I think it is fairly obvious, that the record would be assisted if we could have some producers who actually do this job to come on the witness stand and give us the facts, and I called Mr. Sipes --

THE COURT: I see absolutely nothing wrong with your having put any witness you want in touch with your company. In fact, I think it is a contribution to, what should I say?, the way in which the case will go along.

On the other hand, I see nothing objectionable about Miss Kearse trying to get the background of their contacts. I don't expect you to come up with any hanky-panky, but she has a right to ask what their contacts were and what the conversations were.

This case I don't think is going to turn on credibility of witnesses and I don't think Miss Kearse is suggesting that.

Go ahead.

MISS KEARSE: I think I have a question.

THE COURT: You do. You asked him to tell you who the man was.

Q Who was that?

A I met him shortly after that. It was Mr. Collins

THE COURT: What is Mr. Collins' position?

MR. COLLINS: I am an associate of Cravath, Swaine & Moore.

Q When did you receive this call from the ... on the West Coast? I'm sorry. I have forgotten his name.

THE COURT: Ruben.

A Mr. Ruben? I really don't remember, Miss Kearse. It was some weeks ago. I really don't remember.

THE COURT: But it was not months ago.

THE WITNESS: It may have been a couple of months. It may have been.

THE COURT: All right. But then it wasn't a long time.

THE WITNESS: No, it was not last year.

Q When did you receive the telephone call from Mr. Sipes?

A I don't remember that, either. It all -- you see, at that point these were items among many others that I was dealing with, and it didn't register. I don't remember the sequence. I'm sorry.

Q Did you receive the telephone call from Mr. Sipes after you had spoken ~~of~~ to Mr. Collins?

A It could have been before or after. I really don't remember.

Q Was it prior to last Friday?

A Oh, yes.

Q I believe you testified that you first learned the details of the proposed per use system last [illegible]. Is that correct?

A The details of it, yes.

Q So that you received assurances that your extra costs would be covered before you received any information about the details?

A Well, it is not that cut and dried, Miss Kearse. When I speak of details, I really mean the nuts and bolts. I was generally apprised of the system, but you can't absorb and think about things and see if you can reflect it on your own usage and how you would cope with it in a general discussion.

So the nuts and bolts and nitty-gritty, I was able to relate it to my operational procedure last Friday.

Q But prior to the time when you were able to relate it to your operation, you received assurances that your increased costs would be covered?

A That's primary. Absolutely. I wouldn't consider it --

THE COURT: You don't consider that a detail?

THE WITNESS: Pardon?

THE COURT: I say, you don't consider that a detail?

THE WITNESS: I consider it number one.

Q Did you speak to Mr. Collins in person?

A Yes.

Q Where was that?

A It was in Television City, Hollywood.

Q Whereabouts?

A In my office.

Q Was anycne else present?

A Mr. Ruben was there at first. Mr. Collins had a colleague with him for awhile. Most of that was -- he was asking me how I ran my show. We didn't talk -- we talked very little about this per use system. I think he was gleaning information as well as -- he was asking me questions about my show.

Q Do you remember the name of Mr. Collins' colleague?

A I don't.

MR. HRUSKA: Your Honor, may I state at this point, the witness has been on the stand virtually the entire day. It is getting late. May I inquire through

your Honor whether Miss Kearse intends to complete this fairly soon, in which case maybe we can avoid having to bring Mr. Wright back on Monday.

THE COURT: I had assumed that, in the light of the length of the other examinations, even including Mr. Topkis', that you would be able to finish fairly soon and that it would be a favor to the witness to try and do it. But am I right?

MR. HRUSKA: I should state here --

MISS KEARSE: How late are we willing to sit?

THE COURT: I am willing to sit for another hour. I am. But I will say this: I am a little puzzled by this particular line of questioning at such length. I don't like to interfere with it because I have respect for your professional competence. But it isn't so far developing anything which seems to me to cast much light on the subject. I don't know whether you have any reason to believe it is going to.

As I understand it, Mr. Wright is an important witness and I don't want to foreclose your asking him anything that has to do with the substance of the case.

MISS KEARSE: Well, have you sustained an objection to my last question? I think I had one pending, which was who was Mr. Collins' associate?

A My answer is I did not know. I did not remember, I am saying.

Q During that conversation did you get into any of the nuts and bolts of the per use license?

A We did not.

Q Last Friday, Mr. Wright, did you meet with Mr. Hruska or Mr. Collins?

A I met with Mr. Hruska and Mr. Collins was there off and on occasionally. He was a busy man.

Q How much time did you spend with them?

A I spent a few hours, I would say three or four hours.

Q Was Mr. Sipes present?

A Mr. Sipes was there part of the time.

Q Have you spent any time with Mr. Hruska or Mr. Collins since Friday?

A I have had conversations with them, yes.

Q By telephone?

A Partially telephone and in person, both.

Q How many times have you talked to them since Friday?

A Oh, dear, I don't know. I just didn't keep track.

Q But it was several times?

A I have been in court ~~everyday~~ every day and so I do speak to them in court and during the breaks and so forth, if it is nothing more than a hello, how is it goin

Q Have you spoken to Mr. Sipes since Friday?

A Only to say, "Stop sweating, Don," or something, you know. I don't know.

Q During the time that you were meeting with Mr. Hruska or Mr. Collins on Friday and during the time that Mr. Sipe was present, did Mr. Sipes repeat CTN's assurances to you that your increased costs in a per use system would be covered?

A He did, indeed, and I made another point to ask

him, to make sure that all of the costs that at that point were coming too late to me would be covered, and I received that assurance again.

Q As part of the nuts and bolts of the per use system, as it was described to you, was it your understanding that with respect to a particular usage, the same rate would be set for all compositions?

A No, it wasn't. I don't think, as a matter of fact, that was discussed. That was a nut we missed.

Q Mr. Wright, suppose that the per use system were in effect and for the Carol Burnett Show, you had selected two possible compositions for a certain slot and you checked with ~~CTa~~ CTN -- well, let me change that -- you would expect to be able to check with ~~CTr~~ CTN to find out whether or not those compositions were in the per use reservoir, would you not?

A Correct.

Q Now, you would be able to check at what price they were in?

A That is my understanding. It would be in the monitored read-out, the computerized read-out.

Q Suppose you checked and found out that Song A was covered by the per use license and that Song B was not covered by the per use license, would you be impelled

by that fact or persuaded by that fact to choose Song A, rather than Song B?

A Well, but I don't know the conditions of Song B so my first reaction would be, let's get a bid on Song B. It's been pulled and here is the name. Let's call Mr. X and see how much he wants for his song.

Q Suppose Mr. X wanted the same amount for Song B as the per use rate for Song A?

A Then I'm in business. I got my total choice.

Q Suppose Mr. X wanted more than the per use rate for Song B?

A Okay. If I prefer Song B and my creative people thinks it is this much better and it is only costing this much more, I'll buy it.

Q Suppose it costs you substantially more?

A I would try to make a better deal with him and ask him why he is charging that much for the song and tell him what I want to do with it and ask him if he would sell it to me for less.

If he wouldn't, then I would have to make a creative judgment -- is it worth that much money, or can I use Song A as a sufficient substitute that is not going to damage my show and damage my production -- of course, I'll go for the cheaper song.

Q Now, if you chose Song B, which is priced higher than the per use rate for Song A, would you expect that CTN would allow the price of Song B in your music budget?

A If the overall estimated budget for that show -- if it makes it go up, in other words, over net budget, do you see what I mean? If I had spent all the other moneys that I had in my allocation for the rest of the music on that show, and this puts me over, yes, I make a call to business affairs and say, fellows, it is important to me, will you back me up if I buy this song," we really need it and it is going to put me over and I have assurances that until the thing settles down at least for the coming season or the season that we are working under, yes, they will reimburse me.

Q So this type of situation is covered by your assurances from Mr. Sipes?

A I understand that this kind of situation is covered, yes.

Q Did that assurance involve the condition that if possible, you would trade off the increased cost of the music against some other element in the program?

A It was -- I must say all of this is during the trial and error and settling down period.

THE COURT: Sooner or later it is anticipated that both sides would reach a budget figure?

THE WITNESS: Surely.

Q Mr. Wright, suppose CTN cancelled its ASCAP and BMI licenses and CTN asked you to clear the music performance rights and told you that, assured you, in fact, that your costs in that would be covered, would you find that a feasible situation?

A No. The costs are only part of the problem in a by-pass situation. Of course I would expect my costs would be reimbursed. They would not expect me to absorb that along with the millions of other problems they are throwing at me along with the millions of other problems in a by-pass situation.

Q I assume you are exaggerating when you say millions.

A Well, hundreds, literally.

Q Hundreds of other problems?

A I think so. Because they snowball, Miss Kearse. You can't go into -- you are producing a weekly television show of the dimensions that we are doing and you have worked out a system over six years that is ~~typed~~ right and economical to get the most for your dollar, you can't plunge into a whole new world without basic rules and

without understanding on both sides of the fence on how you are going to operate.

Q Mr. Wright, are you aware of the alternative relief requested by CBS in this action, namely, an injunction against ASCAP and BMI granting licenses to television networks?

A I am not terribly -- I've heard it in the court but I'm not -- I don't understand it.

Q Well, let's assume for the moment that that alternative relief were to be granted.

A What alternative relief?

THE COURT: That the Court, as a solution to this case, not a solution but as a disposition of this case, ordered ASCAP and BMI not to and thereby prevented them from licensing any networks, so the whole field is wide open.

MR. HRUSKA: Your Honor, on a deferred basis. In other words, made a decision and deferred the entry of the order for --

THE COURT: Start that a year after the order. There would be a year for a transitional period. A year before that occurred.

MR. HRUSKA: With a per use system for the music in the can.

A But we are operating under a system of some kind?

Q No system.

A There is no system.

Q No system, no license to the networks.

A Well --

THE COURT: Except as pointed out, some protective mechanism with regard to music in the can but I don't know whether Mr. Wright is concerned with it in the can.

MISS KEARSE: He is concerned with putting it in the can.

MR. HRUSKA: During this year period, between the date of the decision and the effective date of the order, that is, the date on which ASCAP and BMI get out of the field, during that period, obviously the networks would have to be operating under some sort of a license and that, presumably, would be a blanket license for that year.

Q Let me pose a question which relates to the period of time after the injunction against licensing of the ~~networks~~ networks becomes effective, whenever that may happen to be.

If ASCAP and BMI were enjoined from granting any license to the television networks except, perhaps, with

respect to music for programs already in the can, do you believe that you could operate satisfactorily?

A Well, let me understand all the conditions so I can give you a proper answer.

No network has any kind of a license, the independent producer, then, is on his own without any rules, without any mechanism, has to go out and get a license and I am in the same boat that Nick Vanoff is on the Julie Andrews Show on ABC and whoever is on NBC; they have to do that, too? In other words, are we all in this together?

THE COURT: As I understand it, everybody would be fending for himself.

THE WITNESS: Well, it is chaos, unless you have set up ground rules. You can't abandon one system and go to another without an interim form of a changeover.

In a season you probably could do that changeover, it seems feasible that that could happen in a season of television but you can't just abandon everything for a year and say at the end of this year, what will you do, what are you leading up to?

It seems very chaotic to me. I couldn't operate.

MISS KEARSE: Could I have the reporter read

back the last dozen or so words of the answer.

THE COURT: Yes.

(Record read.)

Q Mr. Wright, I believe you said that there were an average of about twenty to twenty-five compositions performed on the Carol Burnett Show, is that correct?

A That's correct.

Q Of those twenty to twenty-five compositions, how many on the average would you say are written by the people on your staff?

A I have never figured it out. I think we can do it quite easily by looking at the cue sheets and if we took a season, it would be a good example. I don't really know.

Q Could it be as much as half the music?

A On some occasions, perhaps.

Q Would that be true on most occasions?

A I don't know.

Q Let's assume that half of the compositions are written by the people on your staff.

A Right.

Q And let's assume that we are operating under a per use system.

A Right.

Q And let us further assume that you get in touch with CTN to find out if the other half of the music is covered by the per use license.

THE COURT: Back to the per use reservoir now.

Q Back in the per use system.

A All right. Go ahead. I am with you.

Q Suppose that the music which was not composed by your staff was not covered by the per use reservoir, how would you proceed then?

A Well, just like I would if half of it were not written by my staff. I still would follow the same procedures because I have a form.

I or my representatives call the name and the number and make the deal. They are ready for my call and they are prepared to deal with me and they make the deal or we make the deal.

Q Suppose, again, that CTN had no license from BMI or ASCAP and suppose you had the names and addresses of the people who wrote the songs that you have selected for your program, could you contact them to get performing rights?

MR. HRUSKA: Your Honor, I object to the question.

If this is not the sixth time we have been over

it, it is at least the fifth.

The question itself asks for a physical fact -- if you had the names and addresses and telephone numbers of a bunch of human beings, could you make a telephone call.

THE COURT: I fail to understand what the effect of the assumed state of facts of not having a license, Miss Kearse, would have on the ability of somebody to get in touch with whose name and address he has, if that is what the question is.

MISS KEARSE: So do I, your Honor, and that seems to be a distinction that has been made by the witnesses.

THE COURT: I haven't understood that. You are free to ask the question. He seems to be also free to argue it.

However, we all seem to agree, all of us are concerned with the disposition of this case, that is true.

MR. HRUSKA: I will stipulate that if Human Being A has a telephone, that Human Being B can reach him on the telephone.

MR. TOPKIS: That is progress, your Honor, and it is accepted cheerfully on behalf of ASCAP.

Q Mr. Wright, I believe you stated that if CTN

had no license from BMI or ASCAP that you felt performers would be reluctant to appear on your show, performers of musical compositions.

THE COURT: I think, am I not correct, that he said that that was so if the other networks continued to have licenses, and I make that distinction because we also have been talking of a situation where there is an injunction against all networks.

Am I correct that that is what you were talking about?

THE WITNESS: Yes, your Honor, you are absolutely correct.

Q You think that reluctance would be confined to the situation in which CTN was unlicensed and the other networks had licenses; is that correct?

A That's true.

Q Have you ever spoken to a performer about this possible situation?

A I've had no occasion to do that.

Q You are just putting yourself in their places?

A I am.

Q You were describing earlier today setting up the Carol Burnett Show, I believe you said -- well, I believe you referred to 1967, am I wrong about that?

A That's correct.

Q And you told us something about renegotiating an agreement with CTN?

A Right.

Q And I believe you stated that CTN was privy to individual elements of costs of the show at that time particularly?

A Yes.

Q Is it less privy to individual elements of cost of the show at the present time?

A No. It is just of less concern to them. This show has developed through the ages and they know how much we spend on items. They get copies of our contracts, just like the unions do.

It is just not as viable. You are not setting up a new thing.

Q So they get just as much information; it is just that they don't care as much about it?

A That's right.

Q Does Banner Associates deal with other television networks?

A Yes, we do.

Q Are any Banner Associates programs being shown on other television networks at the present time?

A Not a series, at the present time, not right now. There will be a series this summer on ABC that we are producing.

Q Any others planned?

A Only specials. We have a Movie of the Week in the works and a Peggy Fleming Russian Special that is being edited at this point.

Q When you come up with an idea for a series, would it be your practice to submit it to CTN before you submit it to the other two television networks?

A Not necessarily, no.

Q Do you consider CTN to be your best customer?

A I don't think that is true at this point, no. I think probably NBC is Bob Banner Associates best customer. It changes, you know.

We are in the market to sell shows. We have no rights of first refusal to any network. We will take it to any network we can to make a sale.

Q Whom did you mean by "we"?

A Bob Banner Associates, Incorporated.

Q I believe you also mentioned earlier that there was a renegotiation with respect to an Australian program or opening of an opera house.

A This was my example, Miss Kearse. We were

talking about moneys that had been given to us over and above the pre-arranged package price.

Our package price for the Carol Burnett Show next season has been predetermined and was agreed upon around February, when renewal came around.

The opera house offer came after that. It was an intriguing offer. I went down and surveyed it and talked with the people. We got our budgets together. Their costs and our costs and so forth.

When we had it all together, we were about 25 grand over, to make it work. In order to do that, we went to CBS Business Affairs and said, fellows, we think it is a worthwhile project; is it worth it to you; can you give us for that one program an extra $25,000 to cover it.

The deal is that they will cover us in our expenses over and above our normal package price up to twenty-five; we will not get that money but the point is --

THE COURT: Not unless you spend it?

THE WITNESS: Not unless we spend it. If we spend it, we get it.

Q When did this renegotiation take place?

A Of the entire package or this one element?

Q This one element.

A This took place, what -- three or four weeks ago we started talking about it and made the request.

MISS KEARSE: I have no further questions.

THE COURT: Thank you.

Mr. Hruska.

I assume that Mr. Wright would like to finish up tonight, if we can.

THE WITNESS: That would be delightful. I will come back Monday, though.

THE COURT: You will be in New York anyway?

THE WITNESS: I'll be in New York anyway.

THE COURT: I didn't understand that or I would have let us go earlier. On the other hand, if you have just a few more questions, let's finish.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Do you have any basis for believing that the CBS Television Network has an interest in the popularity of the Carol Burnett Show?

A Oh, surely.

Q And an interest in the quality of that show?

A That would go hand-in-hand, I would think.

Q You were talking before on cross-examination by Miss Kearse about the injunction system and I would

like to feed a few more facts into the hypothetical.

On Date 1, a decision is entered in this case which says that the ASCAP and BMI system of licensing music is illegal, a violation of the antitrust laws, and the decision further states that one year from Date 1, ASCAP and BMI will be enjoined from licensing television networks.

Now, during that year, notices go out to every member of ASCAP and BMI informing them of that fact and urging them to send to the television networks the name and telephone number of somebody whom they designate to deal directly for their music.

THE COURT: Other than Herman Finkelstein.

MR. TOPKIS: That is why he is absent.

Q And during the course of that year, all the notices that come in are fed into a CBS computer and a terminal is put in your office with this same cathode ray tube screen that we talked about under the per use system.

Now, the end of the year, we go into the new system. ASCAP is out of it.

Let us further assume at this point in time, every major publishing company, music publishing company in the United States, has given to the CBS computer the name of an employee or agent who has been set up to deal

for music performance rights and let us further assume that every other nonmajor but significant music publishing company has designated some agent, perhaps one agent dealing for six or twelve for their music, to issue direct performance rights licenses.

Is this a system under which you can operate?

MISS KEARSE: Objection, your Honor. I think that is one of the most flagrantly leading questions I've heard in a while and that is something.

THE COURT: I am not worried about its leading quality. A hypothetical question has to be leading to posit the facts.

I think it has to be subject to connection at some time by proof that CBS can accomplish the things which it has told Mr. Wright to assume which will exist but, subject to connection, I'll allow the question to be answered.

So that means, Mr. Wright, go ahead and answer it.

A Well, yes, simply because you are setting up a system that has a year to take shape and all parties are aware of it, the shock is over, it can shape itself down and in and through and we can explore, during that year and we can find the bugs and fix it.

So, my answer is yes, I think I could work with it.

Q Now, you talked before about conversations you had with Mr. Sipes.

A Right.

Q And assurances that he gave you.

Are you under the impression that Mr. Sipes gave you a blank check?

A No, I am not.

Q You talked about problems that Mr. Bernard Brody sometimes had in dealing for synch. rights.

Do you know whether those problems occur primarily when the rights for which Mr. Brody is attempting to obtain licenses are not owned by publishers who are represented by the Harry Fox Agency?

MR. TOPKIS: Could I hear the question?

(Question read.)

A I must say I don't know the answer to that.

Q One way or the other?

A No.

Q Under a per use system, you had testified before about certain direct licensing transactions that you would expect to enter into; that is, transactions directly between you and a, say, a music publisher, copyright

proprietor.

A Right.

Q How would you expect, in the normal case, to pay for use of the music in Carol Burnett episodes that were repeats? In other words, not the first network run but the second or the third.

A Well, I would base it on the way that we handle other elements of our show that have that problem. I am referring specifically to talent or staff.

I would build in, up front, when I buy the thing initially, a clause that allows me to have a certain or I should say pay a certain price for the first, second and buy-out conditions.

In other words, a normal procedure for us would be 50 percent on the first rerun, 25 on the second and 25 on the third and buy-out on the fourth or the last 25 would be considered a buy-out.

That is accepted industry standard.

Q You would expect a pattern somewhat like this to develop on music performers' rights?

MISS KEARSE: Objection.

THE COURT: Sustained as leading.

Q One more.

CBS, I ask you to assume, has a per program

license from ASCAP in which the fee is 9 percent of the certain portion of the advertising revenues of the program.

Under this license, let us assume that that per program fee, 9 percent of those revenues which would otherwise have to be paid to ASCAP, can be avoided if all the ASCAP music, every bar of ASCAP music, which is used on that program, is licensed directly from the copyright proprietor; assume that.

A Right.

Q Assume also that the CBS Television Network has an identical license from BMI, relating to BMI music; okay?

A Okay.

Q Assume further that the CBS Television Network says to you, producer of the Carol Burnett Show, we are turning music performance rights licensing over to you -- you in effect will assume our per program licenses and what we are going to do for you, Mr. Wright, is to give you a budget of that 9 percent figure.

Question: Do you have any problem with respect to using both ASCAP and BMI music on your program?

MR. TOPKIS: What does that mean?

THE COURT: I think he is trying to bring out he is going to pay 18 to get music from both of them? Is

that it?

It seems to me that some of the propositions that have been put to poor Mr. Wright are matters for lawyers to argue.

MR. HRUSKA: I agree but the questions concerning the per program license were put to Mr. Wright on cross-examination.

THE COURT: Maybe so. Maybe I am more sensitive not because it is your question but because it is 25 past 5, but I do assure you that if you are trying to bring out the fact that on the per program situation, if you want music from both agencies you have to pay a fee to both, that I thoroughly understand that and that creates a problem.

MR. HRUSKA: That was not simply all I was going to bring out but let me get to the next question which is really the last small area to cover.

Q Let's assume your budget is 9 percent of a portion of advertising revenues.

A Okay.

Q And let's assume that if you use any ASCAP or BMI music on that program which has not been licensed from copyright proprietors, that is, licensed directly, you will have to pay 9 percent to ASCAP if it is ASCAP music,

or 9 percent to BMI, if it is BMI music, or 18 percent if you have got both.

My question is, do you regard direct licensing of music under these circumstances, if you can follow me, as being feasible?

MR. TOPKIS: If your Honor please, isn't that wholly an argumentative question?

THE COURT: I think it is but I certainly didn't question the proposition when Mr. Sipes yesterday pointed out that having to pay 18 percent, if you had to, had some difficulties attached to it.

MR. TOPKIS: As Sophie Tucker used to say, being rich is better than being poor.

MR. HRUSKA: It is not simply that. The question merely is, is it inherently more restrictive to attempt to direct licensing under a per program system than it is under a per use system.

THE COURT: I understand that that is the general area but I really don't -- I think that is a subject for argumant of counsel.

MR. HRUSKA: Fine. No further questions.

MR. TOPKIS: Just one.

RECROSS EXAMINATION

BY MR. TOPKIS:

Q Do you remember, Mr. Wright -- this is the penalty of saying yes to Mr. Hruska that we all have to pay -- Mr. Hruska put to you an involved question which began on Date 1 and an order issues and so on and so on.

Do you remember that question?

A I think that is the one I never answered.

THE COURT: No. You did answer. It is the one in which he asked you if you had the year to get ready --

THE WITNESS: Oh, yes; got you.

Q He was saying to you, would it be okay, would it be feasible, possible, if you had a year to get ready to deal directly with all three networks and ASCAP and BMI were enjoined from issuing licenses and all members were invited to send in information which would go into the CBS computer and with a cathode ray tube in your office and all major publishers would have designated a representative to deal, and you were asked, would that be a system under which you could operate and you said with a year to get ready for it, you said, yes, I could.

A Yes.

Q Suppose on Day 1, CBS announces that a year hence we are going to drop our ASCAP and BMI licenses and

we are going to send invitations to all their members to send us information which we will put in our computer and we will give you a cathode ray tube and a wire and all major ~~publishers~~ publishers will designate a representative to deal, et cetera, et cetera. Same conditions.

Any difference in the result?

THE COURT: Let's be sure that the witness understands what the factual difference is in your suggestion.

As I understand it, the Court does not order that and, therefore, the assumption is that NBC and ABC continue to have licenses.

MR. TOPKIS: Whatever they want.

THE COURT: Wouldn't that obviously bring Mr. Wright back to answering, whether he is correct or not, that the people he would try to do business with would be hostile because of CBS's behavior?

THE WITNESS: That is my answer.

THE COURT: I think I've heard every possible variety of permutation today.

MR. TOPKIS: Okay. Hostility is our problem on that.

THE COURT: You can deal with that.

Are we ready to release Mr. Wright?

MR. TOPKIS: Yes.

MR. HRUSKA: Yes.

(Witness excused.)

THE COURT: The parties are ready to release the Court and we will resume at ten o'clock on Monday morning.

MR. TOPKIS: Could we know one thing? As of this moment we know of one witness whom CBS proposes to call, another producer, I gather, and we are entitled to two trial days' notice in advance or three trial days' notice in advance of who our witnesses are going to be.

THE COURT: I'll ask Mr. Hruska to honor that request.

MR. TOPKIS: Vicissitudes are always possible.

MR. HRUSKA: We plan to call Duke Vincent on Monday and quite possibly to be followed by George Sunga. The only reason I say quite possibly is George Sunga is another producer.

I believe it would probably be useful to have three producers at least called to the stand and, therefore, it is our present plans that those will be the next two.

The witness after that, if I remember correctly, is Al Berman of the Harry Fox organization and I think

the witness we are thinking about after that, I'll even give you four, is Marion Mingle, also of the Harry Fox organization.

THE COURT: Fine. Good night, gentlemen.

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Date	Page	Line(s)	Error	Change To
May 3	331	7	direct a license	direct license
	331	24	a program	a per-program
	332	19	prhase	phrase
	336	21	it alone,	below
	339	13	BMi	BmI
	342	14	packages	packagers
	345	25	sara	sure
	347	5	effect dif	affected if
	349	16	haveto	have to
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Date	Page	Line(s)	Error	Change To
May 3	351	14	of	the
	351	15	of	at
	353	2	conclusion	inclusion
	354	11	the packagers'	the packagers'
	360	19	know whether CTN	know whether, when CTN
	362	19	of per	of a per
	363	20	sill	still
	366	24	ma	am
	368	7	impel	compel
	370	8	didyou	did you
	370	23	didnt'	didn't
	375	21	lotter	letter
	377	17	sureof	sure of
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	386	2	on a	a
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	390	23	Georg e	George
	391	9	mema'e	me make
	394	12	factors	packagers

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Date	Page	Line(s)	Error	Change To
May 3	394	13	clearned	cleared
	400	7	those	the
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	403	10	the	a
	404	7	pefofrmance	performance
	406	8	I cite	I can cite
	407	2	affairs	affairs at
	410	23	rehearees	rehearses
	411	20	realted	related
	415	24	custumes	costumes
	417	5	a little light music	"A Little Night Music"
	417	11	put	pull
	420	16	What part of the	What part does the
	421	9	takekindly	take kindly
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Date	Page	Line(s)	Error	Change To
May 3	427	8	under the table	from the tape
	428	25	on hand	one hand
	430	24	to but	to, but
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	432	11	on the direct difference	on the differ-ence
	433	6	ASCAP's and BMI's	ASCAP's, or
	433	11	he pull	he may pull
	436	9	reimburseus	reimburse
	437	11		delete "that it will be"
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	441	23	thatyyou	that you
	450	7	their	this
	450	12	their	this
	451	14	I can't	I can
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	460	16	on-hire	on-line

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Date	Page	Line(s)	Error	Change To
May 3	460	22	in use	per use
	465	15-16	copywriter	copyright
	468	4	clear	cleared
	472	18	best	guest
	477	20	sosiety	society
	500	5	ma	an
	510	22	coperation	operation
	511	17	thatyou	that you
	514	19	presolve	resolve
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	527	10	ahve	have
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Date	Page	Line(s)	Error	Change To
May 3	482	22	in a direct,	in a direct licensing situation,
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	513	19	assuming	Assuming
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	521	13	tack	take
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	538	18	Only say	Only to say
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	539	14	CTn	CTN
	539	15	CTn	CTN
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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563- 7

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.	69 CIVIL 5740

New York, May 7, 1973

STENOGRAPHER'S MINUTES

COLUMBIA BROADCASTING SYSTEM

vs. 69 Civil 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

May 7, 1973
10:00 a. m.

(Trial resumed.)

THE COURT: Mr. Hruska?

MR. HRUSKA: Yes, your Honor.

THE COURT: Miss Kearse?

MISS KEARSE: If your Honor, please before we hear testimony of the next witness, first I would like to move to strike such testimony of Mr. Wright as dealt with his supposition as to the actions, reactions, thoughts and so forth of writers, publishers and performers as based purely on speculation and --

THE COURT: Well, I am not going to rule on that offhand but if you want to specify from the transcript what you are referring to, I'll look it over.

MISS KEARSE: Secondly, I would like to ask the Court to ask Mr. Hruska to give us more information as to the aspect of the per use system as proposed by CBS which deals with whether or not a uniform price is to be set by composition with variances only as to the nature of the use

of the composition. We have been led to believe in this case both by CBS's prior memorandum and by Mr. Sipes' testimony on deposition that what was envisaged was a price per composition, not different prices for different compositions, and it is imperative that we know what the system is in order to be able to defend this case.

THE COURT: I agree and I don't think Mr. Hruska disagrees that it is a sensible point and I don't know that you are wrong in your assumptions. I think I introduced a note or maybe the one who introduced the note of confusion by assuming something different in the question I asked last week.

Mr. Hruska, are you prepared to make a statement now or do you want to make it during the day?

MR. HRUSKA: Let me say, your Honor, it is very, very difficult for me to understand the circumstances right now as to which price differentiations, based upon the identity of the composition, would be warranted, given the fact that each copyright proprietor would have a cancellation right and could negotiate his own prices on a use by use basis.

Now, I don't want to rule out that possibility only because if it turned out at the relief stage of the case that somebody could make an awfully good economic argument

which I just frankly can't see at the moment, as to why there ought to be a price differential based upon the identity of the song, then we might accept that argument at the time.

I don't think that the liability phase of the case really depends in any way on whether or not it would be the same price for songs irrespective of the identity of the song or whether it would be a different price.

MISS KEARSE: Well, your Honor, this factor affects not only the feasibility of getting this system into operation but it quite materially affects the right of withdrawal of the writers and composers. If we have got to go through negotiations first in order to figure out whether or not a writer or publisher wants to withdraw his song because the price set for different songs are different, then we have got a completely different system from what we have been led to believe was proposed, and I object to going forward unless we know what it is we are trying to deal with here.

THE COURT: Well, let me express these views at the present time.

I think it is unfortunate that we didn't, among us, realize the necessity for trying to crystallize these issues more precisely until we got to this point, but there are some built-in difficulties, I think, not attributable to the plaintiff.

They are the fact that as part of what we are calling the liability issue here, we have the unusual situation, peculiar to a case like this, that plaintiff has to demonstrate a degree of feasibility and the feasibility will depend on what -- obviously must depend on what he is proposing. That is, we can't begin to determine whether "X" is feasible until we know what "X" is.

1B

On the other hand, I do sympathize, and it isn't just a question of sympathy but I think there is merit in Mr. Hruska's pointing out that there are various stages in this proceeding that he does not contemplate at any particular time with reference to the issue we are now talking about, a variety of prices, but that he cannot foresee what might be the outcome here and, therefore, he has to keep his options open, so to speak.

There are two ways in which we can proceed under such circumstances, two theoretical bases upon which we can proceed, as I see it.

One is that we have before us, in my judgment, the defendants for opposition, to oppose, and the plaintiffs to prove alternatives. That is, that the system either will involve a variety in the cost of the songs and it will not, and, obviously, what is to be the outcome of either course will be different from what might be the outcome on the other course.

That's one way of trying the case.

The other way is to determine that CBS should be required at this stage of the game to elect which course it is going to follow. I am willing to receive argument or written material from the defendants, if they wish to require it, actually, of course, with the opportunity to

Mr. Hruska to oppose it, but I must say that unless they can show me what legal prejudice they would suffer from having to cope with two issues at this stage of the case, rather than one, legal prejudices as distinct from inconvenience and the length of the trial, which I am unhappy about, I would be disinclined, to use a current term, to require CBS to elect at this time.

Now, I dont deny the importance of this issue. I am not trying to get away from it or evade it. I would be glad to meet with lead counsel and talk about it at length and depth further but I think that this is about as far as we can go about it at the moment.

MISS KEARSE: Well, I think we have already been prejudiced because this new element was introduced after Mr. Sipes left the witness stand. We didn't have an opportunity to cross-examine him on that.

THE COURT: We can recall him. If you want him recalled, I will see to it that he is recalled. I don't mean to be lighthearted about this. I mean, this is a case in which the turning of one stone seems to show all kinds of -- I will say maggots -- but other things crawling around than what we anticipated and when new issues arise, we are going to have to get the plaintiffs to take a position on them; I don't doubt that.

MISS KEARSE: Your Honor, it's not even so much a question of new issues, but a question of changing the position and it's almost impossible to defend against a proposition and its opposite at the same time, and that's the position we are being placed in.

THE COURT: I don't think it is necessarily impossible to defend against the proposition and its opposite at the same time or that they are necessarily opposites, but if it is, what you are really, then, saying is that you are being legally prejudiced, and I am not trying to nail you against the wall but I say this is complicated and we have to think it out and it's difficult to do it on ad hoc motions from the well of the court, when I am sitting on the bench and don't have the chance to give it the kind of deliberation and reflection that is necessary.

I'll be perfectly glad to take whatever time we need from the hearing of witnesses to think the thing through.

In any event, I think we should go ahead with the testimony at the present time and let us say shortly before we resume this afternoon I sit down with Mr. Topkis, Mr. Hruska and Miss Kearse to determine how to handle major issues of this kind, if they arise.

MR. TOPKIS: Just to put one on the agenda today, and no further discussion of it, a similar problem that has

occurred to me is this matter of the Court fixing prices.

I would like a statement from counsel as to whether any such proceeding would be initiated or would be initiatable by CBS alone or by ASCAP or an ASCAP member and I think that, too, might be appropriate for discussion.

THE COURT: All right. With the understanding that we will discuss these matters out of the courtroom, let's hear the next witness.

MR. HRUSKA: I would like to call to the stand, your Honor, Duke Vincent.

EDWARD DUKE VINCENT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Would you state your address for the record, Mr. Vincent?

A Yes. 2158 Stradella Road in Los Angeles.

Q What is your profession?

A I am producer of network television shows.

Q On what television programs have you worked and in what capacity?

A Beginning in 1964 I began preparing and producing and writing a series calle Man In Space for Seven Arts Television, which was a series that generally followed the progress of the United States Man In Space effort.

Then, in 1967, I moved to California and I wrote for a half-hour television program called Good Morning World and a show called The Doris Day Show.

In 1968 I became the producer of the Gomer Pyle television series.

Then, in 1969 and 1970, for these two years, I produced the Jim Nabors Variety Hour.

In 1971 I went to work for Twentieth-Century

Fox Television, producing Arnie, and in 1972, for Warner Bros. Television, producing The Little People.

THE COURT: What was the last one?

THE WITNESS: The Little People, Brian Keith, your Honor.

Q Who was the packager of the Nabors program?

A Naborly Productions.

Q Could you briefly describe what your responsibilities have been as a program producer?

A Well, actually it involves -- in the case of a half-hour show and an hour show, obviously they are two completely different situations. In the case of Naborly, with the Jim Nabors Hour, I actually participated in the packaging negotiations prior to the fact. So, on the Nabors Hour, I was involved in creating the show and making up the budget before the show actually went into production. Then, of course, you were responsible for all creative elements of that show and you were responsible for bringing the show in on budget or off with a profit.

In the case of Gomer Pyle and in the case of Archie and of The Little People, I was working for, one, an independent producer and, two, for two different networks. Those shows were created prior to my arrival on the scene. Budgets had been made up. They were in existence. So

I was only responsible, for that show, for the creative direction that show took and the budget that already existed, but not for the original packaging negotiations.

That was true only in the case of Naborly Productions and Jim Nabor's Variety Hour.

THE COURT: Is that the only show on which you worked on budget matters?

THE WITNESS: We worked on all shows on budget because we are in fact responsible for the budget. But the only show for which I created the budget was the Jim Nabor's Hour.

THE COURT: I see.

Q Did you say you participated in the negotiations with CBS for the package deal on the Nabor's Hour?

A Yes, I did.

MR. HRUSKA: Your Honor, I received over the weekend a set of papers with respect to the understandings between CBS and Naborly Productions on the Jim Nabor's program. Your Honor had expressed last week an interest in seeing a package contract, and I have here such a contract. I thought we might mark it as an exhibit.

I had a chance this morning to show it to Mr. Topkis, not to Miss Kearse --

THE COURT: Mark it for identification now.

MR. HRUSKA: I was expecting to receive additional copies of this this morning, but I gather they have not yet come in.

THE COURT: How is this described?

MR. HRUSKA: It is a set of papers constituting the agreement between CTN and Naborly Productions.

(Exhibit PX 962 was marked for identification.)

THE COURT: Is Naborly spelled N-a-b-o-r?

THE WITNESS: N-a-b-o-r, yes, sir.

MISS KEARSE: May I take a look at it? You didn't show it to me before.

MR. HRUSKA: Yes (handing).

THE WITNESS: The name obviously derives from Jim's last name.

THE COURT: Yes. That's why I asked.

MR. TOPKIS: If your Honor please, if we are going to have that one document, which is a letter agreement, I would ask that the file of CTN relating to the negotiation of that document be made available to us. Typically, in my experience at least, such documents are the end product of a series of negotiations, and often they are supplemented. I would like assurance that we have the whose story.

MR. HRUSKA: I will simply look into it, your Honor. I understand this is the story.

THE COURT: You mean look into it to see if there is anything further, or what?

MR. HRUSKA: Yes, right. I was not even planning at the outset of the case --

THE COURT: If you don't introduce it in evidence, that is one thing. If you do, why --

MR. HRUSKA: Frankly, I would not have had it here except for the fact that your Honor had indicated an interest in it.

THE COURT: That doesn't diminish the force of Mr. Topkis's suggestion, if you want to call it that. If I am to see something, what that really means is that it is going into evidance. If it is going into evidence, then I think Mr. Topkis is right. I have to be sure that there isn't anything else to be brought to my attention in that file.

MISS KEARSE: Your Honor, I join in Mr. Topkis's request. On its face this document indicates that a more formal agreement would be entered into.

THE COURT: All right.

Do you know offhand, Mr. Hruska, whether a more formal agreement was entered into?

MR. HRUSKA: I was about to ask the witness that, your Honor.

THE COURT: All right.

Q Would you look at that, Mr. Vincent, PX 862?

A Yes.

Q Why don't you look at the memorandum of agreement, which is the last --

A The deal memo?

Q Is that what you call a deal memo?

A Right.

Q Have you ever seen that before?

A Yes, I have.

Q The last paragraph of that memo says something about a more formal agreement to be signed, to be executed. Do you see that?

A Yes, I do.

Q Do you know whether a more formal agreement was ever executed?

A No, I do not. To my knowledge it probably was not, because normally it is not the case. We always refer in our business to more formal agreements --

THE COURT: And you never do it?

THE WITNESS: And we never do, your Honor, mainly -- again, this is a familiar term in television production.

We call it the deal memo. We make out deal memos when we hire stars, when we hire choreographers, and normally what it involves is a telephone call, and it is unusual that I would have seen this deal memo in the first place, except that it was part of the file that was sent to me. Otherwise I probably would not have seen it.

I know about what's in it. I know about what we were talking at the time we negotiated that contract. My responsibility, again, was for the budget, what I thought the show would cost, why I thought it would cost that amount of dollars.

THE COURT: I am very interested in what you have to say, but I think we had better stick with Mr. Hruska's questions because we have a lot to go over here.

THE WITNESS: I am sorry. But this is known to me to be a deal memo, and I know that there was supposed to be another formal agreement. If it ever came into existence, I have no knowledge of it.

Q I am interested in one thing you said. You said in dealing with a performer you very often make agreements, what you say on the telephone or a handshake.

A Yes.

Q Why don't you enter into formal agreements with performers?

A Terribly simple. We don't have the time. There is no time to sit down and negotiate formal contracts.

What we are interested in in the television show, if I want Barbara Streisand, I call her agent: is she available? Does she have any special requirements? If he says no, yes, or whatever, the deal is then made in a matter of minutes over the phone.

Yes, the deal memo will follow in some form, but I'll probably never see it and I certainly will never sign it. Whether I should or should not, I'm not discussing, but I never did.

Q All right. Are executed agreements of any particular value to a producer of a television program, executed agreements with star performers?

MR. TOPKIS: I must object.

THE COURT: I will sustain that objection. You are asking for a conclusion of the witness.

Q Why don't you insist on getting written agreements?

A Because our business is done basically on the word of the people with whom we are doing business. We know their word is good or we wouldn't do business with them.

So, if I know that the agent for Kate Smith or

for Robert Goulet says, "Yes, you can have him the week of August 15th" or "September 2nd," his word is good; I know that that man will be there. I don't have to have a signed agreement for that. That's not the way we do business.

The only imagery I have for a different business that would work this way is when you call your broker on the phone. You don't negotiate a contract at that point in time or exchange a check. We deal on the basis of good faith.

Q That memorandum of agreement --

A This one (indicating)?

Q Right -- was executed as of October 15, 1958, as of. Do you know when in fact that memorandum of agreement was executed?

A No, I do not.

Q Would it shock you to find out that it was executed years after 1968?

A Not at all.

MR. TOPKIS: I object, your Honor.

THE COURT: I don't think it matters, that the question referring to shock is very revealing.

Q Is it common in your business, Mr. Vincent --

THE COURT: You mean in the industry, I take it?

MR. HRUSKA: In the industry, right.

Q -- that memoranda of agreements, what you call deal memos --

A Yes.

Q -- are not signed until years after the deal has a handshake on it?

A As I stated, Mr. Hruska, I've never signed one in all my years in the business. I make a telephone call, I deal with an agent, I say this is what I would like to have, what does it cost? He says fine and I get it.

I am aware of the fact that in this particular case, with Naborly Productions, the William Morris Agency which was our packager of record for that show, who handled the paper work, would draw up deal memos, as we call them, and copies would go out. But when they were executed or signed was never a matter of concern for me because it had

nothing to do with what I was dealing with.

Q Getting back to the negotiations of a package deal with a television network, how do you determine the price at which you are willing to sell to the network the right to make network runs of the program?

MR. TOPKIS: If your Honor please, I gather this witness negotiated one contract. Couldn't we have testimony about that one contract?

MR. HRUSKA: I would be happy to limit it to the contract between CTN and Naborly Productions.

Q How did you determine the price at which you were willing to sell to CTN the right to make network runs of that program?

A I was asked by the packagers to make up a budget for that show, and that budget included all elements of the show with the exception, of course, of music performance rights. It included choreographers, musical directors, dancers, singers, stars, guest stars, the above-the-line production staff, which includes, of course, secretaries. We came up with a figure. We added a reasonable profit to that figure and that's the price that we offered that particular program to CTN for.

Q And was there a separate stated price for each run of the program?

THE COURT: Each run?

MR. HRUSKA: Yes. In other words, the original run and then repeats.

A Yes. We did make a deal for repeats at that particular time.

Q If you have price "X" for the original run, then you have "X" minus something for the rerun, and so on and so forth?

A Exactly the way it is done.

Q And there would be a smaller price for each rerun?

A Yes, it is always smaller.

Q Did that package include synchronization rights to the music used on the program?

A Well, in this particular case it did because when we made the original deal --

MR. TOPKIS: Excuse me. The witness has answered the question, I believe, your Honor.

THE COURT: Yes.

THE WITNESS: I'm sorry, your Honor.

THE COURT: All you were asked is whether it included those rights and the answer is "yes." Is that right?

THE WITNESS: Did it include synchronization rights?

THE COURT: Yes.

THE WITNESS: Well, yes, it does sometimes, your Honor.

THE COURT: No. We are only asking about the Naborly show.

THE WITNESS: In the Naborly show, it did, yes.

Q Have you ever worked on a program where the package sold the network did not include synchronization rights?

A Have I? No. Because the only one that I dealt with was the Nabors Hour, and that one did include music synch. rights.

Q Did the package include performance rights to music?

A No.

Q Are there any other elements of the program which were not included in the package?

A No.

Q What was the format of the Nabors Show?

A The Jim Nabors Hour was a musical variety show which included musical production numbers, songs that were sung by the stars, songs that were sung with the guest star, duets, opening production numbers, closing production numbers, sketches. It was, I would say, probably a typical

musical variety hour.

Q Could you outline the basic steps that you went through in putting together one program of the Jim Nabors Hour and possibly, as you do this, indicate when you chose the music to be performed on that program?

A All right. Typically we ran on a two-week production schedule, a pre-production week and a production week. Obviously, the pre-production week exists alone and in and of itself only once, and that is the very first week you do the show. Consequently, you are always involved in doing two shows simultaneously, the one that is actually in production that will be taped that week on Friday, plus the one you are going to do the following week.

What we did was, we met on Monday, we had our first production meeting. In that production meeting, I would have all my above-the-line creative staff people. That would mean I would have my choreographer, my musical director, my set designer, my costume designer, my director, and in some cases the agent for whatever star or the manager of whatever star we were going to use in that week.

If they couldn't be there in person, then we would talk to them on the telephone and discuss such things as: What direction that particular show was going to take; what direction the comedy was going to take with regard, of

course, to the gest star; how are we going to create two or three sketches within that show. Again, we look for balance in that area, the same way we do with music.

In our show, typically we open with a musical production number. Jim would come out and begin to sing a song. It was built around one song primarily, "Back in Your Own Backyard." It is the kind of a song that says "Hello" to the audience. It is a kind of an upright number.

During that number, at some point in time, typically the eight dancers would come out and the eight singers would come out, and we would wind up with seventeen people on the stage in that particular opening number. We called it our opening number.

The other kind of music we would use on the show would be whereby Jim would sing a solo. That would be a little bit different kind of music. That would be perhaps, in Jim's case, because of the kind of music he sings best, something like the "Green, Green Grass of Home." I am trying to indicate the kinds and ways we use music and the reason we had to have a mix.

We would then have a guest star who would sing a song, a song that we would have discussed prior to this time. "What would you like to sing?" "I would like to sing this." "Jim is going to sing that." Or, "Jim did it last week,"

or "I saw that on the Flip Wilson Show," or whatever reason. We would negotiate and we would come up with a song, two songs, three songs. There would always be, obviously, alternates to what we had thought about.

Then we would come up with the third kind of music, which would be our finale, or a full-blown production number, in which we used our star, the guest stars, all the singers, all the dancers. And that would be a concept-type number. It would normally run between eight and ten minutes with Jim's final closing song. It might be all New Orleans songs, all St. Louis songs, it might be a theme, aviation. We would do "Up, Up and Away," a song like that. Any good, logical reason, as long as there is a body of music that exists, is a reason for doing a production number.

At that point in time we would decide on those things and which way we felt we wanted to go.

In that production meeting, then I would ask for certain things. I would ask my set designer -- after we discussed the concept, which way we were going -- to come in with estimates on what he thought the sets would cost, I would ask the costume designer for estimates on what he thought the costumes would cost, I would ask my special musical material writer and musical director to lay out a

concept for that medley, what songs they suggested, and I would also ask him for the prices of those songs with regard to synch. rights.

Normally, they would run between $50 and $150, because there could be surprises. For instance, for some reason, you have to use "Happy Birthday," it is a much more expensive song. It costs you $500. If you are involved in a Beatles' catalog; those song rights are normally more expensive.

I would ask for those budgetary estimates. We would all split up and continue doing the show we were doing that week, taping that show. We would be in rehearsal.

We would meet again on Wednesday, and in the Wednesday production meeting they would feed back all of the information that I had asked for, and at that point in time, if we had not broken the budget and if everything looked good and nobody had changed their minds and I liked the layout, if the mix looked right, and if we felt that we could in fact do that show that way, I would give the go ahead, and once you give the go ahead the machinery goes into motion.

Now the costumes actually will start to be designed. The sets will start to be designed in toto and built. The lead sheets for the musical production numbers

will be written. And as of the following Friday, and the last production meeting of the pre-production week, I will then have the final meeting and say, "Gentlemen, where are we?" Then they will show me costume designs, they will show me set designs, they'll show me in fact the lead sheet that our special musical material writer has written, and all of that material then will get its final go ahead, and on the next Monday we go into production.

That's basically how the pre-production week works.

The production work is comparatively simple. We rehearse Monday, Tuesday and Wednesday. On Wednesday we have a run-through of all elements of the show. We look it over. Thursday we go before cameras and all day long the entire cast on Thursday is blocking the shots for the director, and Friday we shoot.

Q There are a couple of phrases there. "Lead sheets on music." What is a lead sheet?

A A lead sheet is the item that the special musical material writer, in our case a man by the name of Ed Scott -- specifically in the case of, let's say, the big production number at the end. That production number may have eight, nine, ten songs in it.

A lead sheet, or an arrangement of those songs,

has to be made, not a formal arrangement where we talk of orchestration but the way we are going to use those songs, in what order, how much of them, because many times we don't use all of them; one chorus where there may be a contrapuntal, an initial melody, when I was using two songs simultaneously. That might happen.

He would lay that out in lead sheet form and it was from these lead sheets that two things would happen: One, on Monday, copies of these lead sheets would be given to the guest stars as they came in, as well as the star, and from that they would rehearse beginning on Monday morning, our first music rehearsal.

The second thing that would happen would be, from that lead sheet, or the minor corrections that would be made after the stars that came in, from that lead sheet our orchestrators would make a full-blown orchestration for that particular production number.

The same was true of every musical number in the show, but obviously the production numbers were the most complicated. In other words, a lead sheet for "Green, Green Grass of Home," typically, or "Snow Bird" would not be normally as complicated. Or we might even use a published piece of music for that show.

Q Do you have one lead sheet for the entire show

or one for each musical event?

A One for each musical event.

Q You also referred to blocking out the show on Thursday. What did that consist of?

A The blocking day that I -- blocking refers to camera blocking in the context that I use it. The first time that the entire cast goes before cameras is on the Thursday prior to the Friday that we tape before a live audience. So that is the Thursday of production week.

All day long the director is blocking the cameras. It is more or less a little ballet that he creats there with shots, and he wants to know how he can shoot each dance, why he can get a shot, why he can't. We refer to it as a little ballet of the cameras.

He needs that time because that's the first time he has seen the show in toto "on camera" on monitors, and he plots his shots, and from that plot list with the assistant director and the technical director, that is their formal rundown of the shooting schedule to take place on Friday. It is a directors' rehearsal more than a performers' rehearsal, in that context.

Q Now, what factors do you take into consideration in choosing the music for the program?

A Well, as I said before, we are interested in several things -- one is an overall mix of that program. There can be a problem with mix because, let's, for instance, take a situation whereby our star is Jim Nabors. If our guest star for the week is Johnny Cash, we have two performers of generally the same type, basically known as country-western type singers, so there is going to be a lot of internal negotiation for who sings what in that particular case or Andy Griffith might be another typical case.

So, we take into consideration general overall musical balance within the show. There has to be a mix or you have no freshness.

The second thing we take into consideration is what that guest star wants to do. Their wishes are terribly important to us. They must be happy, they must do things that they are able to do. We can't arbitrarily decide that Johnny Cash is going to sing "Pagliacci," because he is not going to do it. No matter how good the mix is.

So, therefore, we will discuss with that star what they wanted to do and what our star is going to do and what our general overall concept of that show is going to

be.

The third thing is, we will always be constantly watching other variety shows on the air at that point in time. Specifically, if it happens to be a situation whereby in our case the second year Flip Wilson was against us, or in competition with us, so we would try to do things that they were not doing. We attempted to keep the feel of what was going on in Variety at that time, so that we could do something different for our audiences.

Q Why is that so important?

A For the freshness of the show. I mean, obviously, there is a reason people watch television shows and they don't want to see the same thing week in and out. If Flip did a New Orleans production number the week before I said I would have liked to have done one, it would have been a poor decision because when you look in TV Guide and it says that, and it usually does -- usually, in a variety show, in TV Guide, it will list the elements of that particular show, who is the guest star and what you are doing, so you want to constantly go for freshness and what is good for your star, what has not been done as opposed to what has been done.

Q Have you ever built a production number around one particular song?

TELEPHONE CHERRY 7-8579

A Well, in our particular case, the opening production number we always built around one particular song.

Q A single song?

A A single song. Again, a song that said, "Hello," that welcomed the audience, that was up and bright and had a good tempo that Jim could sing and the dancers could dance to, and you could build some sort of choreography around, that was a bright, up song. We built around that specific song.

In the case of the closing production number or what we call, on Nabors, the finale, we never did do that. We always built around a concept, using many songs, so it was two different types of production.

Q Could you tell us approximately the average number of songs that you used on the Jim Nabors Hour?

A On a week-to-week basis? It would vary. But I would say between fifteen and twenty-five songs. That would not be at all unusual. We would normally use eight or nine or ten only in the finale. In whole or in part, now? Let me understand. You don't necessarily mean total songs.

Q No.

A You mean pieces of.

Q Pieces of included.

A Yes, that would be a reasonable figure, fifteen to twenty-five.

Q What types of music would you use?

MR. TOPKIS: What types of music what?

MR. HRUSKA: Did Mr. Vincent use on the Jim Nabors Show?

A Well, on our particular show we were involved mainly with three types of music -- two, primarily. One, Broadway show music or standards through the years -- songs that are very familiar that people want to hear sung over and over again.

The third type would be a current hit. We might use that in association with a particular guest star who had a hit song at that time, but by and large those were the three general types of music that we used. The first two, of course, a great deal more than the latter, the third type, on the Nabors Hour.

Q On the hits, what kind of hits did you use?

A Well, a typical example might be, for instance, let us suppose that, well, it happened to us -- we had a guest star one week, Bobbie Gentry. I think the name of the song was "Fancy." Bobbie had written the song and when she came on the show, we had heard a lot of it. It was a

current hit on the charts, and we felt that, our creative judgment at that time was that, because of the fact that Bobbie had that hit, that people wanted to hear her sing that song, so we asked Bobbie to sing "Fancy," which was her song, and she did that song. It was a current hit and that was the only song she sang. She sang a duet with Jim, a medley of songs. She worked in the production number and the sketches, but in her spot, the guest star's spot, we asked her to sing her current hit. I believe at the time it was a song called "Fancy."

Q How often did you use new music that had not already hit the charts?

A Well, the only new music that we created especially for the show, that I asked our special material writer to write. We would have no reason to use --

Q Apart from that?

A Again, it's a creative decision on our part, I guess, as much as anything else.

Our concept is that there is a specific type of music and a specific type of audience we are directing these shows toward. We try to play the music and sing the songs that we think they want to hear. There are various ways we figure out what that is, but it is totally obvious to us, after doing this for awhile, that the

standard or the Broadway show songs are what the people want to hear our type of star and guest stars sing. So that is what wa use. We would not use a song arbitrarily that hadn't been on the charts. We would have no reason to. I mean, why?

Q I don't know.

A No. We would, however, have Ed Scott compose a melody and a lyric specifically to set up a musical production number. If we were going to sing eleven songs about New Orleans or St. Louis, we might ask our own staff composer and lyricist to set that idea up in 12, 16, 18, 20, 22 bards, whatever it was, creatively, that he felt he needed to set the modd, set the tone, tell the audience, "This is what we are going to do for the next eight minutes," and then go into the standards, the songs about the city or the town or the place or the concept that we were doing. But that would be the only reason that we would ever use a song that nobody ever heard of.

Q Both of us have been using the term, "charts." Maybe we ought to define that.

What is your understanding of the word, "charts"?

A When I am talking about chargs, I am talking about Cash Box.

THE COURT: Cash spots?

MR. HRUSKA: Cash Box.

THE WITNESS: It's a publication, your Honor.

THE COURT: It sounds like the Top Ten.

THE WITNESS: Yes, basically. It's a list of current songs and how well they are doing at a given point in time. The only reason that I am interested in that at all is, if, say, I have a specific guest star like a Helen Reddy or, again, a Bobbie Gentry or a John Tillotson, who are pop music stars, as it were, well, even Johnny Cash, whoever it might be, who has a song that is rising rapidly in the charts and is obviously going to become a hit, and I see that, I don't really have to see it myself, because the guest star will tell me about it very quickly. If I want to check it, I go and look.

That would be the reason I would be interested in that particular piece of music in those charts but, generally speaking, that kind of music was not very important to our type of show. We dealt, again, mainly in concepts and ideas that dealt with standards through the years or Broadway shows. Rodgers and Hart medley. It would be a perfect example of a good production number at the end of the show. We might use eight, ten, twelve, thirteen, fifteen Rodgers and Hart, Lerner and Lowe. It doesn't matter what the idea is, as long as we have what we

call a hook around which to build the number, then we build it with the people on our staff, using whatever music is available.

Q Has anybody at the CBS Television Network ever played a role in the selection of any musical composition which has been used on any show that you have ever worked on?

A No. They have no reason to do that. That's not part of their area. That's what they hire me to do.

MISS KEASE: I move to strike such part as deals with CBS's reasons to do such a thing.

THE COURT: I'll accept the answer as "No."

Q Now, you had mentioned the fact that some other music was used on the Nabors Hour. Who created that music?

A In our particular case it was a man by the name of Ed Scott. He was a composer and lyricist who we hired as a part of our staff to create or write or compose a specific kind of music and that specific kind of music was in the man setting up the opening and closing production numbers, setting the idea of the song and the reason he had to do that was because we found it a lot easier than for the choreographer to go with a specific concept. Although you may be singing, let's say, "Back in

Your Own Backyard," you may be using the song in a context that really doesn't require a backyard but so, if you have a concept to go with, the special musical material writer will set that concept, so that the audience necessarily doesn't want to see a backyard. The backyard in this case may be clouds. In other words, there may be some humor attached to the number and we are saying that "back in your own backyard," in our sense of the word, is in the back-yard of heaven or wherever, or could be Hades, it could be whatever. We may be doing a little musical joke, as it were, to set that concept in the audience's mind, rather than just coming out and singing the song -- we'll ask our special musical material writers to write a little piece in front of it. The same is true of the closing production. That would be the reason we would have to use them.

Q How do you go about selecting a composer to write such music for your program?

A We go after the best possible man in the field who is available.

Q These people have talents which are specially applicable to writing original music for a television program?

A I would say their talents are very special, yes, because they are asked to -- my sympathies are with them,

obviously, because they do not compose and write out of some creative mood that takes them at a moment in time where all of a sudden the melody floats through their mind, the idea of the song or the lyric. We are asking them to write within very specific bounds, create for me a piece of music that will work in this particular spot at this particular time to set up a concept and do it now, not tomorrow or the next day, but do it now and do it right the first time, because if you don't, I don't have time to fool around changing it.

So, he is special in that way and we call him a special musical interpreter but not for that reason, but I think they are highly talented men and a breed of themselves.

Q Is there competition for their services?

A Among variety shows always, sure.

Q Is that any different from other program elements?

A No. You are going to find on a musical variety show, I guess, as any other area, there is always competition for the top people in the field; we need them, we must have them. Our schedules are extremely tight. Our timings are always tight, and you have got to have top people who know what they are doing, obviously. We go after them

and bid for them.

Q How much did you pay Mr. Scott, for example, to write music for the Nabors Hour?

A My recollection is that his staff fee started somewhere around $1,250 a week with escalations after that.

Q What do you mean, "escalations"? Subsequent years?

A Yes.

Q And did he get residuals for repeats of programs?

A Yes, he did. That was part of the original negotiation with him. It was, as we repeated a show, most of the creative members of our staff received residuals on runs.

Q Just so we have this absolutely clear, he got a specific fee for the original of each program, right?

A Right.

Q And then he got, I take it, a lower fee for each rerun?

A Correct.

Q And the fee for reruns would be referred to as a residual?

A A residual or a repeat fee.

Q On top of that, he got ASCAP or BMI distributions?

A Yes, I would assume so, sure.

Q Did CBS Television Network get involved in any way in the selection of Mr. Scott for your program?

A No.

Q Has the CBS Television Network ever gotten involved in the selection of a composer to write original music for a program that you have worked on?

A No.

Q Synchronization rights. You had mentioned earlier that one of the things you did in your pre-production week was to clear sync rights.

How did you go about doing that?

A Well, in my particular case, I had a member of my staff -- again, on Monday we chose the music and we chose the alternates to that music that we might have, and I asked a member of my staff to call, again in our case, a fellow by the name of Bernie Brodie --

MR. TOPKIS: Who, please?

THE COURT: Same old fellow. I think you should bring your suit against him, somebody.

MR. TOPKIS: He seems to have performed with total satisfaction. Why sue him?

THE COURT: On the monopoly.

A (Continuing) Bernie Brody. I would then give my staff member the prices for the songs that I was con-

sidering using and at that point in time, it was understood that if I used those songs, I had in fact cleared them by virtue of that telephone call.

And my staff member would report back to me "X" number of dollars for whatever songs, and at that point in time I could make a decision.

If I found a couple of songs were more than I wanted to pay, because maybe I would be tight on budget in this particular week, so let us say that I had originally decided to use "Happy Birthday," because I had a specific --

THE COURT: Here we go.

A -- I had a specific reason for doing it, and that's a very unique song because it's the only one that says exactly that, and it cost $500, and I had a production number in which I was dying to use --

THE COURT: I think he is giving you a break. The last bidder paid $600.

THE WITNESS: Well, that was two years ago, so maybe it's up a hundred. It wouldn't surprise me if it were up a hundred.

A (Continuing) I might decide that maybe it would be better, for whatever creative reasons I had at that time, because I felt that I really should have two male dancers on that show, and I typically used eight female

dancers, without male dancers; I had no male dancers under contract, but in this particular show I needed them, what I would then do is make what I called a juggle within that show and I would say, "Okay, here's what we'll do. Instead of singing'Happy Birthday' in that sketch for four bars, you will sing 'For He's a Jolly Good Fellow,' maybe nobody will know the difference. You will have a birthday cake. We'll have candles, you light the candles, blow them out. Take the $500, buy two dancers" -- that would be a typical trade-off reason why I want the figures, the sync rights figures.

Q Did you always obtain or clear synchronization rights prior to taping the program?

A Absolutely.

Q Why?

A Well, because if I tape a show and I've the show in the can and then I am forced to deal for sync rights after the fact, my bargaining position, I would say, at best is it's in jeopardy.

Q What is the normal price range of synchronization rights?

A Well, again, in the Nabors Hour, in the years that we were dealing with Bernie, they normally ran between $50 and $150, somewhere in that area.

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MR. TOPKIS: I don't think the record is absolutely clear what these years are. Could we know?

THE WITNESS: 1970 -- '69-'70 and '70-'71, so the '69 and '70 television season, as it were.

A (Continuing) But the figures that came across my desk were always in that area, and, again, I would not look at them specifically unless I, again, instructed the member of my staff -- you see, if there is a surprise, tell me about it. If they run around $100, fine, then I don't have to know about it. Everything I would consider to be normal and I didn't really have the time at that point to be involved with $50. I was involved with two or three hundred, yes, but not fifty.

Q I take it from what you said they went over 150 on occasion?

A Well, on occasion they did and that's why I had instructed the member of my staff who would be dealing with Bernie to tell me if there were any surprises.

I knew about Happy Birthday. Everybody knows about that. I was not aware of the fact that the Beatles catalog was more expensive than some other catalogs. I was told that it was, so I said, "I never get involved with Beatle songs, let me know what they want," because I expected a surprise.

Bob Wright had told me, I think, that he had paid $350 at one point to clear a Beetles song, so I was ready for a surprise. We talk among ourselves.

Q If you got a surprise, then you would enter into negotiations?

A Exactly. If, for instance, I had a situation where a song, let us say, even say it was $150 but I was only going to use four bars of it, I would ask the member of my staff who was concerned with that area to go back and talk to Bernie and explain to Bernie that the specific use we were going to make for that song was very light, so if it were normally a $150 synch. right song, I would say, "Try and make a deal with Bernie for $50, see if we can get it done, because we are only going to use four bars."

I would get an answer on that. If the answer was yes, fine. If no, then I had a choice -- either delete the song or call, myself, and negotiate.

THE COURT: Did you always just negotiate with Brody or did you negotiate at all with the copyright owner or proprietor?

THE WITNESS: In our particular place, we always called Bernie Brody, your Honor. That was what we did. I, personally, I think, talked to Bernie once in two years. A member of my staff talked to Bernie.

THE COURT: But you didn't do it personally?

THE WITNESS: That's right.

Q As the person within your organization who negotiated anything, if there was anything to negotiate?

A Yes. Your Honor, we did it through Bernie Brody.

MR. HRUSKA: I would like to ask the witness some questions now about the per use system and, rather than going through another --

THE COURT: I see what you are going to do and I was going to suggest -- I thought you stated the hypothetical questions quite concisely with Mr. Wright and the same question could and should be put to these witnesses so we have a standard on which to base their answers.

MR. HRUSKA: At pages 431 through 434 of the transcript, and I would like to just give this to the witness and have him read it and tell us when he is through reading it.

MISS KEARSE: Your Honor, could we have it read into the record at this point, also, so that the questions and answers will be clear and we won't have to keep getting back to page 431 throughout the trial transcript?

MR. HRUSKA: I have no objection except for the payment of an additional $4 for the record.

THE COURT: Well, the questions and answers are to come hereafter, are they not?

MR. HRUSKA: Yes.

MISS KEARSE: Are you going to repeat the hypothetical?

MR. HRUSKA: Well, these pages contain the hypothetical. That's the point of having the witness read the hypothetical.

THE COURT: That is one way of doing it and I have no objection. I think from hereon it would be easier if you took out of this passage precise material relating to the hypothetical question and simply read it to the witness and get the answer, but I have no objection to proceeding on this basis at this time.

Have you read it?

THE WITNESS: I am not quite finished. I am scanning it now.

THE COURT: Go ahead.

Q Take your time, please.

THE COURT: Yes. We want to be sure you understand it.

MR. HRUSKA: There is a typographical error --

THE COURT: Where is it?

MR. TOPKIS: Page 433, line 11, the word

"may" should be inserted after the word "he," so it would read "and he may" and so forth.

THE COURT: Yes.

Q You have read the pages, Mr. Vincent?

A Yes.

THE COURT: Did you understand the discussion there?

THE WITNESS: Yes, your Honor, I think I do, if you will allow me to ask questions if I become confused.

THE COURT: You can ask questions as we proceed, if you need to.

THE WITNESS: Thank you.

Q One of the things that is stated on these pages at 434,precisely, is that assuming that CTN obtains such per use licenses from ASCAP and BMI, it would plan to turn over the functioning or the function of licensing music performance rights to the program packagers so that the cost of music performing rights would be in addition to the costs presently incurred by the packagers.

Now, in this system, how would you, as a program packager or producer, anticipate that you would obtain the money to cover the additional cost of music performance rights?

A My assumption would be that I would negotiate

that particular element with CTN at the time I negotiated for all other elements of the package.

In other words, it would be budgetary consideration. It would be part of my cost.

Q Do you believe, under this system, that it would be any more difficult or any less difficult to formulate a budget for music performance rights than it has been to formulate a budget for other program elements?

A Well, again, all other program elements are negotiated for on the basis of facts that we have all known for many, many years, so that, at the beginning, I would think that probably there is going to have to be a little play in the system, as it were, a little give and take, because we don't know exactly what we are talking about, but, if you are asking me do I think that something can be negotiated, the answer is yes, I think anything can be negotiated.

Q Do you have any basis for believing that the CBS Television Network would be flexible in its negotiations with program packagers?

MR. TOPKIS: I object, your Honor.

MR. HRUSKA: May I finish?

MR. TOPKIS: Excuse me.

Q (Continuing) In this area of music performance rights, particularly at the outset?

THE COURT: I will sustain the objection, Mr. Hruska. You can bring in a witness who can say what CBS's plans are going to be.

MR. HRUSKA: We have had that, of course. Mr. Sipes has given testimony on this.

Q You mentioned before in your testimony that you made your tentative music selections at the Monday meeting of your pre-production week.

A Yes.

Q Now, assume, if you will, that you are now operating under a per use system, you are your Monday pre-production week meeting; you have made your selections.

Could you describe the process, as you see it, of clearing the performance rights to the music that you want to use under this per use system?

A Well, my understandingof the system is --

MR. TOPKIS: Excuse me, your Honor. I fail to perceive how the witness's understanding how he would operate in an assumed world is relevant. It would seem to me that if there are assumptions to be made, they should be incorporated in the hypothetical question and put to him.

THE COURT: I understand that he is being asked questions on the basis of the hypothetical question that he read.

MR. HRUSKA: Precisely.

2 THE COURT: Which is in therecord at pages 431 through 434.

MR. TOPKIS: Right. Then, isn't the only answer he can make "I would perform in accordance with the hypothesis"?

MR. HRUSKA: The hypothesis doesn't set that forth.

THE COURT: It doesn't seem to me that it does.

He is being asked if there was such a system how would he go about doing so-and-so. The doingso-and-so is not positive, as far as the hypothesis.

Would you read back the last question.

(Record read.)

THE COURT: Overruled.

Would you answer, please.

A Well, I think probably what I would do, your Honor, is proceed in almost the exact same way that I proceed now.

At the moment, what I do, as I stated before, is I ask a member of my staff to call up, in this case, Bernie Brody, and get synch. rights.

At that time in time, I would ask them to make a call to the CBS computer which would have the information

that I need, where the songs are, who are the copyright owners, or are they in fact in this pool or reservoir of music that would have been created at this point in time.

I would ask them for estimates or prices of it. If the price were set, fine --

THE COURT: Ask who for estimates?

THE WITNESS: The member of my staff.

A (Continuing) I would ask him to call the computer and get me the information and, some time between the Monday pre-production meeting and the Wednesday pre-production meeting, I would want those figures in my hands.

In the event that one or two or three of the songs or the alternates that we had chosen had been pulled out of the reservoir, I would have asked him to then contact the person who is authorized to deal for that song and to negotiate a price based upon whatever use we had for that song in either a medley, a production number or, if our star was going to sing it.

Then, what I would require at that point in time would be, again, budgetary estimates and that I would instruct him to get that information from the source that I knew to be available.

He would come back to me on Wednesday and then I could make whatever decisions I had deemed to be prudent

and reasonable creatively or budgetarily at that Wednesday meeting.

Q Who on your staff do you think you would get to do this? Let me put it another way --

Do you think you would deal through Bernie Brody on this system or hire somebody specially to take care of you?

A Again, we are making certain assumptions and we are talking about -- do you mean in the beginning or later or after a year or two or at what oint in time?

Q Take it from the beginning, forward.

A Initially, in the way, in my mind I could see as a system like this working, would be everybody is going to be hunting and fishing around a little bit to establish prices, but we are going to be talking about more money, obviously, than we are with synch. rights.

THE COURT: More money to whom and from whom?

THE WITNESS: To us. In other words, I would assume, and--

THE COURT: You mean if you have to find performance rights, et cetera, you have to be paid for that?

THE WITNESS: That's right.

A (Continuing) So, I am going to have an amount of money to buy those rights.

In the very beginning, I may very well make those negotiating calls myself, in order to get a feel of the market that is being created, because it's going to be a new thing and something that I am going to have to instruct members of my staff to do.

As time goes on, what I would expect would happen would be that I would hire someone who knows the music field and who understands in in what area we are negotiating and about what the dollars are, to perform that specific functioning, just, again, as I do with any other element of the show.

I guess in the beginning, there was a buy who was a producer-director-choreographer, who did it all, at one point in the stone age --

THE COURT: Do you have a staff of dancers or do you hire them as you need them? How do you handle that?

THE WITNESS: We have a staff choreographer and we hired eight dancers on what we called the seven out of thirteen contract.

We guaranteed the eight girls, because we thought that they were very good, at least seven shows out of thirteen shows produced. But, often, I supplemented that particular group of dancers, because they were all girls and for specific reasons or needs within a number,

I may have needed boy dancers, so I would go out and hire them on a week-to-week basis.

THE COURT: Who handles that? Do you handle it or does the choreographer or somebody else?

THE WITNESS: When we discuss the con ept on Monday, of the show, we will decide that male dancers are needed. He will ask me for permission to hire two, three or four, but he knows the dancers,I don't. He knows their names, where to find them, who their agents are, because that's his business.

I will instruct him to get me four dancers and his responsibility is to deliver four good ones. Otherwise, I get a different choreographer.

Q Continue under the assumption that there is in effect the per use system which I described in the transcript pages you read, 431 through 434.

Under what circumstances would you attempt to make direct deals or engage in direct negotiations? That is, with the copyright proprietor, when the song involved was in a per use reservoir, part of it.

THE COURT: I think you are assuming that he would. I think it's first necessary to ask would you ever attempt to make a direct deal with the copyright proprietor, if the song was in the reservoir.

THE WITNESS: I might, your Honor, and the reason that I might have is, as I stated before, with regard to synch. rights, let us assume that I am only going to use four or six bars of a particular piece of music and that particular piece of music is X number of dollars.

I would attempt to negotiate a lower fee on the basis of the fact that I am not going to be using the whole song.

Now, maybe I would be able to make the deal or maybe not, but I certainly would take a shot at it.

If there were a reasonable amount of dollars involved -- again, time is always our problem, so in order for me to get involved in that kind of a negotiation, I am probably looking for a trade-off or a juggle of the budget or a creative element within the show, and that's the reason I am doing it.

Q Do you do this now with other program elements, what you describe as juggle?

A We do it all the time. I mean, that is part of our function, to bring in a one-hour show that is going to be a hit, that the network is going to love, because it gets big ratings, and that's why people are watching it and that we can make a profit on it and sometimes those two areas are diametrically opposed, unfortunately.

If, for instance, we want to do a production number built around New Orleans in the nineties, I know costumes are going to murder me on that show because my costume designer is going to come in and have a marvellous idea for five to fifty-two boa fans, and I know they will cost $100 apiece, so already I know I am going to have big problems with him, but I knew that when I said, "Let's do that number," so I am prepared for that argument and I am also prepared for the fact that it has to be a good number, if we are going to do it.

It has to work. So, I may trade-off or juggle another item in that show to get those feathered boas for him, if I think they are important.

Or, I may look down the line and say, "Well, next week we have Robert Goulet on our show. Let's have Goulet and Nabors in a sit-down concert number, which would be a good idea for theshow; it will work for that show and mix; so, instead of building a lot of sets -- like a wharf, a dock, a riverboat, a New Orleans street -- instead of doing that, which is going to cost a lot of money, and I know it's going to cost a lot of money and take a lot of time to design, I may very well choose to say, "Okay, I'll tell you what -- Bob, you bring a tuxedo, Jim, I bought you one at the beginning of the season, you sit

on the bench; we will give you a nice cyc backdrop, and you will sing 11 songs; the number will be marvellous."

THE COURT: That balances the show out?

THE WITNESS: Balances down the line.

THE COURT: Unless you have a critical question, I think it would be a good time to take the morning recess.

(Recess.)

Q Continue the assumption, Mr. Vincent, that you are operating under the per use system and assume that a song that you wanted to use on your program had been pulled from a per use license and you attempted to reach an agreement with the copyright proprietor but the price on which the copyright proprietor was sticking was unusually high, in fact put you over your budget.

What do you expect that you would do under those circumstances?

A All right. If we are saying that I've looked within the budget of that show and I can't find the money and I've looked down the line and I don't think I am going to be able to find the money, and we are assuming now that the song that we are talking about is terribly important to me --

Q All right, take that instance.

A -- that I cannot try and find another song maybe in that particular case, or that typically my guest star insists on singing that song, she wants it, and I can't find the money, I would think that I would have no choice, especially in the beginning, but to go back to CTN, explain to them my problem and say, "Gee, I need relief."

Q Do you have any basis for forming a judgment as to whether you would be likely to get relief under

those circumstances?

A Yes, I do. Number one, CTN is in the business of making hit television shows. It is to their benefit, as much as it is to mine, that this show be good, that it be a hit.

THE COURT: We are interested off the record in your thoughts and opinions based merely on your philosophy. But I think for the purpose of this question I want to know if you have any experiences with CTN that would form a basis for whether or not they would acquiesce in your request for more money.

Have you ever done it before, in other words?

THE WITNESS: I personally have never gone back to CTN and asked for more money. I have asked Don Sipes what would happen if I did, and he assured me he would give it to me.

MR. TOPKIS: Objection.

THE COURT: No. Overruled.

THE WITNESS: I have asked him that question.

THE COURT: With regard to --

THE WITNESS: I posed the same question to him.

THE COURT: When you say you spoke to Mr. Sipes about what would happen if you needed more money in a particular instance, are you talking about something that

actually occurred or are you talking about this proposed per use music?

THE WITNESS: The latter, your Honor.

MR. TOPKIS: I press my objection, if I may, your Honor.

THE COURT: Sustained.

We know that. We know that. He testified to that.

THE WITNESS: Okay.

MR. HRUSKA: All right.

THE COURT: What you are saying is you believe him?

THE WITNESS: Yes, your Honor, I believe him. And Bob Wright has gone back and asked him for more money. Again, we talk all the time because we are in the same building and talk and I know that he's got it.

THE COURT: I've heard that.

Q Assume, if you will, that under this per use system, no new musical composition would enter the per use license until six months after it was first performed on the radio stations, would that cause you, as a program producer, any particular problems?

A No.

MR. TOPKIS: May I have that question back,

please.

(Question read.)

MR. TOPKIS: Is it as the producer of the Jim Nabors Show or the producer of any kind of show?

MR. HRUSKA: Let's say as the producer of a musical variety program.

MR. TOPKIS: Well, again, of the formula that the witness described as being the formula of the Jim Nabors Show, namely, predominantly Broadway show tunes and standards,or another show?

MR. HRUSKA: Your Honor, I don't think the witness' expertise in the field of producing television programs or particularly musical variety television programs is limited to actual facts which occurred in the production of the Jim Nabors' program. I think the witness has described his experience in the field.

THE COURT: I don't, either. Let's let him answer it on a general basis and give any qualifications he wishes, and, of course, you can cross-examine him with regard to special aspects of it.

Will you repeat the question, please, Mr. Reporter?

(Question read.)

A You are assuming, then, that the reason I would have a problem is that I can't find the song?

Q I don't know whether you would have a problem. That's why I asked the question.

A All right. The type of music that we used on the Nabors Hour that might have come into that category, pop music, music rising rapidly in the charts, to my knowledge it doesn't matter how quickly it grows because if we are going after a type of music like that, the reason we would be doing it would be because we had a guest star that we wanted to sing that song on our show, and if it were not on the charts or it were not listed in the per use license, for whatever reasons, I would merely ask the performer who wrote it, who owns the copyright, and where did you find it, and call those people.

In many cases now those people will be the very people who I'm hiring. They write a lot of their own music. So it could very, very easily be, as I told you before in the case of Bobbie Gentry --

THE COURT: You mean write their own songs?

THE WITNESS: Their own songs.

A (Continuing) So they would be the copyright holder, let us say, or at least one of them in that particular case.

So, I don't think I would have any difficulty finding that song, because in all likelihood I would be

dealing with the person who sang it at that moment in time.

THE COURT: That answer is geared to a Jim Nabors type show. What about other types of musical shows with which you have had experience?

THE WITNESS: All right. I was very close to the Carol Burnett Show because we were next door to each other, and we were close personal friends. So that show I know fairly well. I know the Sonny & Cher show very well, and at the time we were taping Glen Campbell was taping.

This was generally the situation with all of those shows that when they --

THE COURT: You mean the structure that you described --

THE WITNESS: The structure was the same. As a matter of fact, when we first were asked to come up with a budget -- when I say, "We," I mean myself and my partner, Bruce Johnson; everything that I do I do with my partner, Bruce Johnson.

When we first dealt with coming up with a concept of a budget for the Jim Nabors Hour, one of the first things we did was we went and studied under Joe Hamilton and Bob Wright for a period of nine weeks, learning their operation and how they did it, and we were

patterned after that show. But we found, in investigating other shows in the field and talking to other producers at that time, specifically Campbell, Nabors, Carol Burnett, later Sonny & Cher, that we all operate in about the same way and we all have the same production problems, we go after the same guest stars for about the same reasons.

That might not be true of a show, for instance, like Hee-Haw or Laugh In. That is a little bit different kind of a show. They are unique in their own way. I don't know what their problems are. I don't mean to testify about what they are. I do know that they are different.

Q Are they post-production shows?

A That is the reason they are different.

MR. TOPKIS: Are they waht?

MR. HRUSKA: Post-production shows.

THE COURT: What is that?

Q Would you explain that?

A Well, we tape our show in front of a live audience, as does Burnett, as did Glen Campbell, as does Sonny & Cher, the main elements, and it is in effect put together at that point in time.

The time that we come out with, allowing for certain editing after the fact for time or for content, that's our show.

Shows like Hee-Haw and shows like, for instance, Laugh In, my understanding of those shows is that they tape in pieces and then put it together after the fact, more or less the way a motion picture is done, as opposed to as a live taped hour variety show is normally done.

Q Now, Mr. Vincent, which system do you prefer as a producer? The per use system that we have been discussing here or the present system?

MR. TOPKIS: Or the what?

MR. HRUSKA: The present system.

MR. TOPKIS: What is the present system?

THE COURT: I don't know that it has been stated at this moment for the record, but that was one thing I thought we did understand.

MR. TOPKIS: I don't know that the witness understands it. That is my problem.

THE COURT: What do you understand the present system to be?

THE WITNESS: The present system is whereby there is a blanket license between the networks and ASCAP and BMI.

THE COURT: And you clear music through that?

THE WITNESS: Yes, under the blanket system.

THE COURT: Performing rights?

THE WITNESS: Yes.

THE COURT: The question, then, is which system you prefer as a producer.

A I would prefer the per use system as a producer and as a packager.

Q Why?

A Well, there are two reasons. The first is: Any time that I am allowed to get money up front for all the elements of a show I have more money with which to create that show. I can in fact what I call juggle elements within that show.

THE COURT: In other words, that gives you more flexibility, is that right?

THE WITNESS: Total flexibility.

A (Continuing) I now have flexibility with regard to everything but music performance. At that point in time I would have that.

THE COURT: May I ask a question here? I don't like to pry too much into your personal affairs or your business affairs, but it seems to me I have to know something more to understand this.

If you use, let's say, fifteen songs on your show, what would you -- I know it has to be speculation, but based on business experience -- anticipate, or putting it

a different way, in answering the question as you are, what are you assuming would be about the amount of money that you would get for the --

THE WITNESS: For the budget?

THE COURT: -- for the budget for fifteen songs?

THE WITNESS: I don't know how that figure is going to be negotiated, your Honor. But if it's based upon about what the cost --

THE COURT: Obviously that wouldn't give you that much flexibility if it were only $5.00.

THE WITNESS: Exactly.

THE COURT: I am being absurd on purpose. But I am trying to show that the scale of the amount that you would get would be relevant in regard to how much flexibility you would have.

THE WITNESS: Well, again we would have to establish a market; where you would go to do that, I don't know. I would assume, Your Honor, that at some point in time you are going to have to look at about what the composers, authors and publishers get now through their society. If that figure --

THE COURT: Have you any idea what they do get now from their society?

THE WITNESS: I have been told it is in the

vicinity of $500, $600, $700, $800, that general area, for a television performance of a song.

THE COURT: And are you thinking, in answering the question that Mr. Hruska has put to you, in that range?

THE WITNESS: Yes, I am.

THE COURT: All right.

THE WITNESS: But whatever it is --

THE COURT: May I go on from there?

THE WITNESS: Go ahead.

THE COURT: Assuming -- for the sake of discussion only, Mr. Topkis and Miss Kearse -- that that was the price, $500, let us say, for a use of a song under the per use system, and you used fifteen songs, so that that would be $7,500, and let us say you told CBS that you had to have a little room in there in the beginning of this system so that you couldn't be sure, so that your budget was, let us say, $8,500 for music for a show. Can you give me some idea what percentage that would be of the cost of one of your --

THE WITNESS: Elements, my above-the-line elements.

THE COURT: How large a factor is that in your total cost?

THE WITNESS: It is a large factor. Even at

$7,500 it is a very large factor. That will buy two minor guest stars, one major guest star, or buy a complete set of costumes. It will buy two or three sets. It will buy --

THE COURT: Would it embarrass you in any way to tell me what the budget is for one of your normal weekly productions?

THE WITNESS: The Jim Nabors Hour is $200,000. That was the package price.

THE COURT: That's what you charge CTN, is that right?

THE WITNESS: Yes.

THE COURT: So we are talking about an increase, then, of something like three and a half to four per cent?

THE WITNESS: Yes.

THE COURT: All right. I just wanted to have some underpinnings for this discussion.

THE WITNESS: I am now interested, your Honor -- strangely enough, even when dealing in figures that high, there are certain set costs that I am going to incur every week, for instance the staff, that I have little or no control over; the office space, the general overhead, and I have often made juggles or trade-offs within my own budget over a matter of $200, where I know I can buy a male dancer for $200 for that specific need. And I would

make a trade-off at that point in time.

Assuming that it is fifteen songs, it is probably closer to twenty-five, and assuming that the dollars we are dealing with are somewhere around $500, it can be an appreciable figure.

THE COURT: All right. Now, that was the first point. Would you get more money up front to give you more flexibility? You said that there were two reasons why you could.

THE WITNESS: The second reason would be depending upon how good a negotiator I am. If I have more money up front with which to deal, theoretically at least I am going to try to make a little bit more money behind the budget. I have more money with which to do business, it is that simple. If I am a great negotiator, well, then, maybe I can save some of that money.

THE COURT: Right.

THE WITNESS: Hopefully I can.

Q What effect do you think this sort of juggling or trade-offs will have on the quality of your program?

A Any time you are allowed more creative control of your show, you have more money to deal with and you are allowed to decide in what specific area within that show you want to use that money, the quality of the show

should be enhanced. You have greater flexibility, greater latitude.

Q The on-screen values?

A For on-screen values, of course.

Q Now, can you think of any reason, Mr. Vincent, why this per use system as described on Pages 431 through 434 would not work for you as a program packager or producer?

A No, I cannot.

Q Assume, if you will, the following facts to be true: Number one, the CBS Television Network has cancelled its ASCAP and BMI licenses --

THE COURT: Its present?

MR. HRUSKA: Its present AXCAP and BMI licenses.

THE COURT: It has nothing?

MR. HRUSKA: It has nothing, right.

Q (Continuing) The ABC and the NBC Television Networks have continued under their present ASCAP and BMI licenses. And, number three, the CBS Television Network has turned over the job of licensing music performance rights to all program packagers. And assume that you are one of those packagers making a musical variety program.

Could you operate effectively under that set of circumstances?

A No, sir, I don't believe I could.

Q Could you tell us why?

A Well, assuming what you said to be the case, my understanding is that, number one, there would be no machinery set up through which and with which I could deal. And by that I mean that I would be forced into a whereby I would have to deal individually with the copyright owners of these songs, but they were not set up, as it were, to deal with me because there had been no court order to tell them that they must deal with me in this way.

What I would be concerned about would be, if I am dealing with fifteen to twenty-five songs per week, with varying uses, I would make a telephone call and I would expect that there would be nobody on the other side of that line expecting to hear from me. So, initially, theoretically, I would get a secretary or someone who would not know what I am talking about and what I want and why I am calling.

Even if I did get somebody finally who would be willing to deal, I think that because there would be no general rule with which we are dealing here, no market place at that point in time, that the best I could expect is, well, we'll have a little discussion here, I'll talk it over with my business people and whatever, and I'll get back to you.

Under the "I'll get back to you," that, in and

of itself seriously hampers my operation as it now exists or as it existed on the Jim Nabors Hour, or on television shows like, for instance -- on television variety shows like the Carol Burnett Show or the Nabors Hour. It would hamper our operation. We have to have answers then. We have to have prices then, because time is the one thing that works against us constantly.

Therefore, I think that I would have a great deal of difficulty dealing with those circumstances. It would cause me grave concern. I would be very worried about that.

Q Couldn't you lengthen your production schedule to accommodate this sort of problem?

A I don't see how. If there is a way to do it, very frankly, your Honor, I don't know how, and that is based upon --

THE COURT: You could lengthen your production schedule and have less shows, right?

THE WITNESS: You could do that, yes. Yes, that certainly might work. But, again, it could or it couldn't because when we make our deals for stars or even for staff, they are made for a specific amount of time. To lengthen those deals in any way in the case of staff will overlap seasons. You might lock them out of a summer

show. They have to charge you for that. It is only fair that they do because you are taking away part of their possible income.

Beyond that, if a show is to have any freshness at all and deal with what is going on in that point in tim you can't push your pre-production weeks back all that fa or you are going to begin to lose freshness. So you necessarily have to be bunched up a little bit.

Q Let's go back to the delays you said you ant ipated getting a secretary on the telephone, et cetera. Don't you think that copyright proprietors are going to see to it that all those delays are removed in this world in which the CBS Television Network has cancelled its ASCAP BMI licenses?

A No, I don't believe that because I am assuming, on the basis of this particular lawsuit, that ASCAP and BMI like things the way they are.

If you are asking me to assume that they are going to have a parade for me if I tell them in front I am going to run an end run around their entire organization and attempt to deal direct and circumvent the ASCAP and BMI --

THE COURT: I don't think that is the question Mr. Hruska asked you. I think he asked you whether you wouldn't expect the copyright owners to make quick arrange-

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ments to deal with you if CBS didn't have a --

A No, sir, I don't, and that's the reason I don't. I don't believe that they would want to see that particular system succeed.

THE COURT: Do you have any basis for saying that?

THE WITNESS: Well, as I began to state before, your Honor, there is a system under which they are operating now, which I assume for them is a very good system and that they like --

THE COURT: Wait a minute. It may be reasonable but what is it that makes you believe that all the members of ASCAP like the ASCAP system? It is true that the ASCAP officials are here, but they have thousands of members.

Are you speaking of what you believe the membership at large likes or what?

Q Why don't you take in fact the kinds of music publishers who supplied the preponderance of music that you used on the Nabors Hour?

A We are talking about now primarily Broadway show music and standards through the years.

Q Right.

A And as I understand it, the question is: Is it

my belief that the society or societies or is it my belief that the individual copyright owners --

THE COURT: The latter.

Q The latter.

A The latter.

THE COURT: Mr. Topkis?

MR. TOPKIS: If I may, Mr. Witness, your Honor, I object to this. How can this man possibly perform a function of a mind reader on ASCAP members and BMI --

THE COURT: I am trying to find out what the basis of his statements are and I may give them absolutely no weight. But it seems to me I have to inquire from people in the industry what their opinions are, however little weight they may carry, if I am to reach any conclusions at all. I certainly understand the limitations on the value of such testimony.

MR. TOPKIS: Could I just add this thought, your Honor? This is testimony that it is utterly inconceivable for me to respond to. What am I going to do? Call somebody who will say, "Oh, I would expect them to show" --

THE COURT: Let's hear what the witness has to say and it will be without prejudice to your move to strike after we have heard it.

MR. TOPKIS: Thank you.

THE COURT: I know of no other way to proceed. We'll see whether we have something or not of a quality that judges and lawyers recognize as being probative.

MR. TOPKIS: Very well, your Honor.

THE COURT: What I asked you was: You had indicated that you do not believe -- I'm only interested in the reactions of copyright proprietors, not the ASCAP officials. I know, as you said, what their attitude is. They do believe that their system is satisfactory and they do believe it is legal, and that's why we are here. But I have no way of knowing yet what the attitude of copyright proprietors are.

You have a point of view with regard to the attitude of copyright proprietors towards the present system. I want to know how you formed that point of view.

THE WITNESS: Your Honor, it is my opinion that we are talking about members of a group, of a group that has banded together for a very specific reason, and they have sought the shelter of this group for good and reasonable reasons, again, I assume.

You are also asking me if I think that I am going to expect them to want to deal with me?

THE COURT: Yes, I am.

THE WITNESS: To come toward me and say, "Yes,

let's make a deal," after I have circumvented their group.

No, your Honor, I don't believe that prudent business sense dictates that I should believe that.

THE COURT: I mean that's just on your general experience, you are saying that?

THE WITNESS: Yes, sir.

THE COURT: Is there anything particular within your experience in your industry which makes you feel that way or is it just that you think that's the way human beings operate?

THE WITNESS: An example of some other instance in our industry? Or with regard to musicians --

THE COURT: Is there something particular in your experience or just do you think that people in general operate that way?

THE WITNESS: I cannot give you a specific example in the music field that I have had anything to do with.

THE COURT: I will sustain Mr. Topkis' objection.

MR. TOPKIS: Thank you, your Honor.

THE COURT: And there is no reflection on you. I just want to be sure.

I mean if your opinion is based on your estimate of human experience, well then, I have that expertise, too,

and so do Messrs. Hruska and Topkis to argue to me. If you knew something they didn't know, that's what I was reaching for, I would want to be made aware of that.

THE WITNESS: No, sir, I don't know something at this point in time in that area.

THE COURT: Okay.

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MR. HRUSKA: I would only argue, your Honor, that I think there is relevance to the state of mind --

THE COURT: I am not saying it is not relevant. I don't think Mr. Topkis is necessarily saying it is not relevant. The question is the question of the competence of the witness on this particular point.

I mean, he may have had factual experience. Or perhaps you could bring in a psychiatrist and we might recognize his expertise on this point. But I think that this witness, who has a lot of interest and experience on relevant issues, doesn't purport to be an expert on human behavior.

MR. HRUSKA: I don't want to beat this as a dead horse, but I just want to say: agreeing that Mr. Vincent would not be an expert on this question, there would be another issue involved in a motion to strike the testimony he just gave, and that is whether his state of mind, irrespective of any expertise, is pertinent to the case as one member of the television production industry.

THE COURT: Well, I don't want to take time on that now. I'll leave it open as to whether you can persuade me that the state of mind of the packagers is relevant. At the moment I am not quite sure how it would be.

The state of mind of the copyright proprietors

would be very relevant.

MR. HRUSKA: Yes, sir. We will have considerable evidence on that.

BY MR. HRUSKA:

Q Now continuing this assumption that CTN cancelled its ASCAP and BMI licenses and ABC and NBC did not, what effect do you believe this would have on your ability as a television program producer to obtain the services of the top performers, the performers at the level that you want to obtain performances for such programs?

MR. TOPKIS: If your Honor please, that question, it seems to me, in all probability is premised upon material that your Honor just struck. If it is premised on something else, it may conceivably be proper.

THE COURT: I will have to hear the question read back because I was distracted. I am sorry.

(Question read.)

THE COURT: As you say, it may or may not depend upon material that I struck in the last question. Let's hear the answer and I'll have to decide.

A Well, your Honor, again I think -- if I keep repeating myself, forgive me, but time is of the essence when we talk about television.

THE COURT: Right.

A (Continuing) And when our guest stars and our star arrive on Monday of production week, the very first question they ask me, week in and week out, is, "What are we going to do?" And "What are we going to do?" means where is the music that we are going to perform? We want to begin rehearsal now. Has it been decided?

I have had that pre-production week to make those decisions. I have had that amount of time to decide exactly what we are going to do. If in fact I did not have time or I was not able to clear music performance rights during that week, for whatever reasons, and I was not sure exactly what we were going to do, it would create a chaotic situation within my organization and within that show. That word gets out very quickly.

THE COURT: Your apprehensions I think were not borne out, Mr. Topkis.

MR. TOPKIS: Very well, your Honor.

Q You were saying that that word gets out quickly. Do you think that that would have an effect on your getting such performers?

A It would have to. It would have to. Again, we are all talking about dealing for about the same number of people who are stars in our field. They don't have time to fool around. They want to look good. They

don't want to sing songs that they can't sing. They don't want to be underrehearsed. They want the amount of time that is necessary for them to do a good job because they, of necessity, have to look good to remain stars.

We have determined over a period of years - and, again, as I say, I am familiar with the shows, as I stated - that it takes between Monday and Friday of produ[illegible] week to do that, to put all the elements together, to get it together. It takes time.

We must start on Monday. If we are not going to allow them to look for it, if we are not going to give them enough time to rehearse, and if we are not going to be able to tell them on Monday exactly what they are going to do on Friday, and that's what they are used to, what they are getting on ABC and NBC shows, yes, I am going to have trouble with them. I think it is logical that I am going to have trouble with them.

Q Is there competition amongthe producers of television musical comedy shows for the services of these performers?

A Yes, sir, there are. Again, there are only so many quality top stars which the Nielsen ratings tell us draw an audience.

THE COURT: Can you give me an example of some

stars that have appeared on your show who appeared on other shows or where you have had problems getting them because they were all booked up, or something of that sort?

THE WITNESS: Yes, your Honor, I think I can give you a couple.

At the time we were doing the Nabor's Hour, we wanted, for instance, to have Glen Campbell. Glen was doing his own show at the time. Everybody in town wanted Glen because he had a headshow. He was a top variety star. Scheduling became a tremendous problem. We were all bidding for him.

The reason he did our show first, and that's one of the other keys, to get him first before he appears on another show that season, was on the basis of a personal relationship between our star and his star. So that happened to be the negotiating element.

We were all bidding for the services of Kate Smith at the same time. Suddenly Kate began to draw big numbers. They wanted to see Kate do Cohan's songs, and we bid for her and we got her.

But we are always usually negotiating for the same group of stars, and those are the ones that draw numbers. It is that simple. And if they draw numbers, then we're in competition.

Q What numbers are you talking about?

A The numbers I'm talking about are the Nielsen numbers. It is easy for a network to tell which stars elevate the rating of that show on the basis of the appearance of that star on the show. They will make us aware of that and which stars they think that is true of, and we will go after those stars because the numbers are terribly important to us, because we want a hit, and to CBS because CBS may be building an entire evening around that particular show.

So it may have more to do with just that hour, maybe the lead in or the lead out that they are concerned with. So they are terribly interested in what we call the numbers game, and that means Nielsen. It is that cold and that hard.

Q Continuing again with the assumption that CBS has cancelled its ASCAP-BMI licenses and ABC and NBC have not, what would your feelings be, Mr. Vincent, as a producer of a musical variety television program appearing on CTN as of that point in time about continuing that program on CTN?

A Well, Mr. Hruska, if I had any choice whatsoever, obviously I'm not going to try and go out and create difficulties for myself. I think I would be in a difficult

position.

If initially under those circumstances I would have sold my show to ABC or NBC, I would have; and if I were on CBS and I could get off it, I would certainly try, because nobody needs aggravation. It is tough enough to do the easy way. To do the hard way is almost impossible.

MR. HRUSKA: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Mr. Vincent, my name is Jay Topkis. Is that a name that is known to you?

A I've heard it in this court, yes.

Q Have you heard it from many telephone operators?

A Yes, I did receive a message from you last week.

Q How many?

A I received one. Did you call more than once?

Q Four times. Did you ever tell my secretary that you were leaving for New York and would call me immediately upon your arrival there?

A Yes, I did. I gave her exactly those instructions.

Q And you never did call, did you?

A No, because I didn't find time to do so.

Q Where were you all this time?

A Are you talking about this week, today, yesterday, last week, the week before, when you called, or what?

Q Well, --

A I arrived on the East Coast and I went to see my mother, who is ill. That is the reason you didn't get a call.

Q I called you two weeks ago this past Friday, is that right?

A I don't know. If you tell me it is, I will take your word for it.

Q And, as a matter of fact, there was a call placed to you the day before that also, wasn't there?

A I'm not aware of that one.

Q In any event, you never attempted to communicate with my office.

A No, I have not.

Q But you have found time to communicate with Mr. Hruska's office.

A I communicated with Mr. Hruska's office this week and about a month ago, yes.

Q This past week.

A This past week, yes.

Q When was that?

A Today is Monday. On Friday of last week and on, I believe, Tuesday of last week.

Q Did you spend some time with Mr. Hruska?

A Yes, I did.

Q How much time?

A Well, I spent the morning of Tuesday -- not Tuesday -- with Mr. Collins, not with Mr. Hruska. With Mr. Hruska I spent some time on Friday.

Q I see. And have you spent any other time with anyone at Cravath this past week?

A Well, I saw them both in court here Monday, last Monday. I was here.

Q Tuesday.

A I'm sorry. Tuesday. Tuesday.

Q Right. So you were in court on Tuesday.

A Yes, I was.

Q And how long were you in court on that day?

MR. HRUSKA: Your Honor, may I put an objection in here? I really do believe that extensive examination on when did you see somebody from Cravath, et cetera, et cetera, et cetera, just simply is not pertinent.

As I said in court the other day, when I started this lawsuit I did not know any television producers. I had to find out who they were.

THE COURT: I don't think you need to apologize, Mr. Hruska. And, as I said the other day, it may or may not prove anything, and I don't think it proves anything with regard to Mr. Wright, I don't know that it is going to prove anything with regard to Mr. Vincent, but I do think that a reasonable examination under the circumstances of his testimony is appropriate, as to how much conferring there has been and so on.

MR. HRUSKA: Let me say this: if Mr. Topkis wants to suggest that I have suborned the perjury of this witness --

MR. TOPKIS: Don't be absurd. Let me interrupt you immediately.

THE COURT: I don't see why you assume that anybody was suggesting that.

MR. HRUSKA: Because I don't see any other relevance to the examination. If that were the fact, then that would be relevant.

THE COURT: I do believe there can be other elements. I do believe that opinions can be suggested to witnesses without their being perjurious or anything of that sort. I would like to know the circumstances under which the gentleman reached his conclusions. But I don't want to go on at length about it.

MR. TOPKIS: I have no such intention, your Honor. I have a few more questions in mind --

THE COURT: It may be relevant or not that Mr. Vincent seemed disinclined to get in touch with Mr. Topkis but not with your office.

MR. TOPKIS: That is exactly the point I am making.

Q What was it, Mr. Vincent, that made you able to spend so many hours in the doubtless pleasant and charming company of Mr. Hruska and his colleagues and not able to take two minutes to lift up a telephone and call me?

A You want a specific answer to that question?

Q I would love one, sir.

A I had never met you before in my life, Mr. Topkis. I had no reason to want to talk to you.

Q You knew my identity, didn't you? That is to say, you knew that I represented ASCAP in this litigation.

A That is correct. I was told that by a mutual friend.

Q I figured as much.

With that knowledge, you decided to talk extensively with Mr. Hruska and his colleagues and not at all with me.

A Yes, I made that decision.

Q And my question to you, sir, is: why?

A Because I felt no need to talk to you. I thought we were going to talk here in court. I knew what my opinions were and I thought that the reason that we were going to be here was for the purpose of your asking me these questions.

Q I see. Tell me, Mr. Vincent, who are you working for now?

A I am in the process of negotiating a contract for next year. The Writers Guild is on strike now.

THE COURT: The Writers -- what?

THE WITNESS: There is a Writers Guild strike, so we cannot proceed.

Q You are negotiating a contract with whom?

A With Screen Gems.

Q To do a television program?

A Yes.

Q For what network?

A Well, I'm not at liberty to disclose that at the moment because it is a negotiation which I'm not a party to right now.

Q Is it with CBS?

A No, no.

Q In your direct testimony you said that your

profession is producing network television programs; right?

A Yes.

Q Do I understand then that there are three possible customers for your product - CBS, ABC and NBC?

A Yes, that's true.

Q When did you first begin to formulate the opinions that you've expressed here this morning on the subject of the per use license world, if I may so capsulize it?

A When did I begin to formulate my opinions?

Q Yes, sir.

MR. HRUSKA: Your Honor, I object to the question. I think it ought to be a lot more specific, in terms of what aspect of the world Mr. Topkis is inquiring into.

MR. TOPKIS: All right.

MR. HRUSKA: He has covered half the testimony.

THE COURT: Why don't you refer to specific opinions he has expressed.

MR. TOPKIS: I will be glad to, your Honor.

Q Mr. Vincent, you testified in connection with the hypothetical question that Mr. Hruska showed you and which you read at, I think it was, page 434 of the transcript.

A Yes.

Q Do you remember that? When, sir, did you first

turn your mind to the subject of the hypothetical assumptions that were put to you?

THE COURT: In other words, the per use system.

THE WITNESS: Yes, I understand the question.

At a meeting at which Mr. Collins came to my office in Los Angeles and asked me what I did in my business and how I did it, I then told him. He then posed a hypothetical --

THE COURT: How long ago was that?

THE WITNESS: It was about a month ago, your Honor. I really don't know exactly when the meeting took place, but approximately a month ago.

THE COURT: A month ago is good enough.

THE WITNESS: He then posed a hypothetical situation of a per use license and asked me whether or not I could operate under that system or would I like to operate under that system or how would I operate under that system, assuming that it was the system.

And I told him, and that was the first discussion that I had on that subject.

Q And that was about a month ago.

A Approximately about a month ago, yes.

Q Did you turn your mind to it in the ensuing weeks or did you next consider it when you came to New

York and met with Mr. Collins again, I think you said, last week?

A That's right. No. In the interim period I discussed it with other producers in the field to get their opinions about what they thought of it, with my partner. It was the subject of a great deal of discussion among other producers in my field and how it might or might not affect us.

Q I see. So your answer to my question is that you did think about it from time to time during that month.

A Yes.

Q Okay. What are you doing right now other than testifying in this courtroom? Have you been gainfully employed during this past television season?

A No. As I explained, I am not right now. We have finished the 1972-73 season. Those shows are now in the can.

Q Right.

A We are between seasons. And because there is a Writers Guild strike, we cannot negotiate new contracts until that strike ends. And when it ends I will then either go with one of three different situations which have been made available to me.

Q You were, however, employed before the '72-'73

season.

A Yes, sir, I was.

Q What show were you working on?

A That was The Little People, for Warner Bros. Television.

Q Incidentally, Mr. Vincent, did anybody at Warner Bros. ask you to call me?

A As I said before, a mutual friend of ours said that you might be calling and that was Mr. Leiter. He said that you might call and that is the first time I heard your name.

Q The "The Little People," on what network?

A NBC.

Q How many programs were there or did you shoot for The Little People?

A Twenty-three. I did not shoot the pilot. There were 24, total, of which I did 23.

Q When were you first employed on The Little People?

A The exact date or approximately?

Q Approximate date, of course.

A The summer, last summer. So, it would be -- this would be the summer of '72. Somewhere in that general vicinity.

Q Incidentally, these three possible projects that you are considering right now, are they all situation comedi

A No. One is a musical variety show.

Q With whom is that one under discussion?

THE WITNESS: Your Honor, is it necessary to answer that kind of a question, because it's the kind of thi

that we shouldn't really talk about in our business, now.

MR. TOPKIS: I don't care, all that much, your Honor.

THE WITNESS: If I must, I must.

THE COURT: I would not press the witness for an answer unless you can show me where it is important to you and I can't see where it would be.

MR. TOPKIS: No. I will withdraw it.

Q That Plaintiff's Exhibit 862 for identification I had hoped that it might contain a budget but I see it doesn't. Perhaps when we get that file that we asked for, we will be able to question a little more precisely but let me just ask you this, Mr. Witness:

To your recollection, did the budget for the Nabors show which you originally negotiated with CBS -- do I understand that is your testimony; that you drew up the budget and presented it to CBS?

A I drew up the budget for Naborly Productions. That budget was then used as a part of the negotiation with CBS.

Q You didn't do --

A That was the basis of that negotiation. The actual deal was closed by -- in other words, what you talk about as negotiations, in this particular case, there was

really no negotiation. We drew up a budget, added a price, I recommended to Naborly Productions that this be the figure we go in with and stand by and CBS then bought that price, so there was not in fact a big, long, drawn-out negotiation. They bought the price that we went in with.

THE COURT: I understand.

A (Continuing) But it was on the basis, if I understand your question, Mr. Topkis, it was on the basis of the budget that my partner and I, in conjunction with the Morris Agency, drew up for those purposes.

Q What figure did you have in that budget for sync rights, if any?

A The exact figure was -- I do not know. I think it was in the general vicinity of about, probably, around 1200 to $1500, but it is not unusual, Mr. Topkis, or your Honor, to include something like sync rights at that point in a budget under the terminology "miscellaneous," because they are not really payable in tape television until the second run of the show and at that moment in time, in negotiation, you don't know whether or not you are going to be able to negotiate for a guaranteed rerun or if the show is going to go off the air in 13 weeks, so you might incluyde it as an item of budget but not necessarily under that title.

THE COURT: Incidentally, when would a show like

Jim Nabors' show be rerun?

THE WITNESS: Well, the first rerun in our particular case was immediately thereafter, in the summer. In other words, we went off the air in the regular season and started runs, reruns immediately.

THE COURT: A rerun, repeats?

THE WITNESS: A repeat of one of the original 2

Q As a matter of fact, that is something I would like to go into just a little bit, so that we all understand it.

How many original shows did you do for the first season of the Nabors show?

A I believe we did 26.

Q Did you or did CBS, after having run those 26, then run them again, the same 26, or what?

A No, sir. To my recollection, they reran ten of the 26 and then they may have asked for more shows but I don't recall right now exactly what those figures are.

They are easy enough to find, if you need the information.

Q Well, what is the typical, or what was the broadcast season for the Jim Banors show that first year that it was on the air, 69 to 70, I think you said it was?

A Well, we began somewhere in September, I believe and ran then through the following February or March, I

guess -- 26 weeks from that date.

Q Doing the --

A There are always a few preemptions, so allowing for preemptions, 26 weeks from what they call premier week. I don't remember what it was in 1969.

It has been late of late. This year we started late.

Q So that with the first 26 shows and some preemptions and the 10 more that you did, you probably got into May or thereabouts, right?

A Somewhere in April or May.

Q What happened then? The show went off the air until the next September and a summer replacement of some kind was put in CBS's programming?

A Well, they reran some of the Jim Nabors Hour and most of our staff then went off to do summer jobs.

Q They reran the ten that you spoke of?

A Yes.

Q And then, from the time that the last of those ten ran until premier week the following season, the Jim Nabors show was off the air?

A That is correct.

Q Did you say that you had a conversation with Mr. Sipes about how much money he would make available to you

or whether he would make available to you money he would make available to you in the event CBS had a per use licensing?

A I never had a formal discussion with Mr. Sipes I merely met him here on Tuesday and I asked him the question directly.

I said, "It's my understanding from Bob and George that you are going to make monies available and be flexible under this system; is that true or false," and he said yes, it's true.

That was the extent of our quote discussion.

Q And Bob and George are Bob Wright and George Sunga?

A Right.

Q And they are the people you had talked with out on the Coast?

A Among others.

Q You spoke of Mr. Scott's getting residuals in the event of a repeat.

A Rerun fees?

Q Yes.

Is there a difference between rerun fees and residuals?

A Well, a rerun fee is normally a term that is used

in tape and residual is normally used in film.

Q But substantively they wind up being about the same?

A Yes, they do.

Q Are those arrangements so far as musicians and composers are concerned, set by contract between Composers and Lyricists Guild of America and the particular packager involved?

A Between the Guild and the packager?

Q Yes, sir.

A Let me make sure I understand your question.

Is the contract I had with Ed Scott, the contract that was drawn between Naborly Productions and ASCAP?

Q No, sir.

A Is that what you are asking?

Q No. You have heard of an organization called CLGA or have you not?

A Yes, vaguely.

Q Vaguely, only?

A Yes.

Q I'll drop it and take it up with someone else.

When you were talking about being able to live in a per use world, Mr. Vincent, finding that a compatible

environment, were you assuming that the per use price applicable to any composition would be the same for the same kind of use as for any other composition in the per use repertory or were you thinking that there would be different prices for different compositions or did you just not turn your mind to it?

A No, I have no basis to assume either, Mr. Topkis but I would say to you that like any other marketable item, probably music will find its own level. I don't know what that level will be, I don't know who will decide what that level is but, in a free and open market, I would assume that that would happen.

Now, whether it's the same for all of Richard Rodgers' songs or based upon years or time or what-have-you I don't know that will be arrived at, but I could --

Q That's not what I am asking you, sir. Perhaps I didn't make the question terribly clear.

I am asking you what you were thinking about as you answered Mr. Hruska's question.

Were you thinking that the prices would be the same, different or just not thinking about that particular question?

A The same in the reservoir?

Q Yes.

A The same for the publishers that pull in the same --

Q In the reservoir.

THE COURT: I think Mr. Topkis means, were you assuming that all the songs in the reservoir would be priced at the same price as each other.

MR. TOPKIS: Right.

THE COURT: Or were you thinking that they would be priced differently or were you not considering that as a factor in your answer?

THE WITNESS: I was not considering that as a factor in my answer.

Q Mr. Scott, you said, from time to time creates special music for, or created special music for the Jim Nabors Show, right?

A Yes, he did.

Q Was that music published, to your knowledge?

A Yes, it was.

Q By whom?

A By a company called Fred Ruth, which was owned by Jim, I believe, and with who else I don't know but it was a shell publishing company. I believe it was Fred Ruth.

Q According to our records, that's right.

A It is Fred Ruth?

Q Yes. And that is a publishing company either owned by Mr. Nabors or owned by Naborly or in some way part of the Naborly operation?

A Yes, it is. Which is not true for Paul who did not have his own publishing company. Ed does not, Paul does. It can happen in several ways.

Specifically with regard to Ed now, his music went through Fred Ruth, I believe.

Q Right. You are right.

Now, Paul Weston is a name we haven't heard before. Who was Mr. Weston? What did he do in connection with the Nabors show?

A He was the musical director of the show, the overall man in charge, as it were. He also conducted the orchestra at the tapings.

Q And did he write some material, musical material for the show?

A Yes. He would write things like play-ons and play-offs for a particular sketch or a piece of bridging material but it was normally not the same type of material that Mr. Scott would write.

Q Mr. Scott was rather more imaginative and elaborate, is that right? I am not asking you to denigrate Mr. Weston.

A Thank you. It was at best, at the very least, more difficult and a more specific form. Mr. Weston, primarily, is a conductor. He is also a composer but for our purposes on Jim Nabors, Paul was our conductor and Ed Scott does our special musical material.

Q The music that Mr. Weston wrote for the show, that was published?

A To my knowledge, it was, and to my knowledge, it was by his publishing company. Now, he may have --

Q An outfit called Hanover?

A That's a familiar name.

Q Did you negotiate the deal with Mr. Scott?

A Yes.

Q For $1250 a week?

A That seems to be the figure. It's a long time ago.

THE COURT: Whatever it was, you negotiated it?

THE WITNESS: Whatever it was, I negotiated it, via my agents and his agents, yes.

We had put a price in the budget and I wanted that price to be as close as what we had put in the original budget, so, in effect, yes, we negotiated it.

Q Now, when you negotiated that price with Mr. Scott -- I'll back off for just a second, please.

That price of $1250 per week, that would be for twenty-six weeks or fifty-two weeks?

A $1250 per show.

Q Per show?

A Per show.

Q So, since you took two weeks for each show and did twenty-six shows, that must have taken fifty-two weeks, right?

A No, sir. As I stated before, we were -- we were in production for more than one show at once.

THE COURT: It takes twenty-seven weeks.

Q It would be twenty-seven weeks?

A No, sir, because we would also take off -- a star is a delicate commodity at best. Their voices get tired, they get psychologically exhausted. We have to take weeks off in between. How many weeks, we never quite know, but in a normal production schedule, we would take off Christmas and New Years.

THE COURT: Mr. Scott didn't get paid by the week but by the show.

THE WITNESS: By the show.

Q And he also got paid sums for when the shows were rerun?

A Yes.

Q Lesser sums?

A Lesser sums.

Q When you made your deal with Mr. Scott and -- rather, when you put that figure in the budget first and then went on to make the deal with Mr. Scott at or about that figure, I suppose you made the best deal you possibly could, keepint your budget figure in mind, right?

A Yes; that is a reasonable assumption.

Q And when you put that figure in the budget and then went on to negotiate with Mr. Scott, you had in mind, did you not, in setting your figure and anticipating his response, that he would receive distributions from a performing rights society, either ASCAP or BMI, for the performance of his material on the air, right?

A No, sir; that's not right.

I make my business deal with the composer or author on the basis of what the market is bearing for that kind of people at the time. What he receives beyond that is not a factor in my negotiations.

Q I don't mean to suggest that it was a factor in your negotiations, but you knew that if he signed up with you and wrote music for you and that music was performed on the air, and he were a member of ASCAP or affiliated with BMI, he would receive distributions from

one or the other of those organizations?

A Yes, sir, I did know that. I am aware of that.

Q Right. And you understood that that meant money in his pocket to him?

A Yes, sir,I did.

Q And my question to you is: Didn't you, in setting your own negotiating posture, vis-a-vis Mr. Scott, have in the back of your mind or maybe in the front of your mind the fact that he was going to get paid not only by you but by someone else, if he signed up with you?

A No, sir. It's not a part of my consideration. Again, I go after the best man in the field, based upon prices that are established over the years. We know about what a conductor costs, about what a composer -- what a writer costs. Whether or not they get residuals or other monies or write a book on the side is not my concern. If Ed Scott becomes famous because he does the Jim Nabors Hour and writes a hit, fine. But it's not a factor in my negotiations for the best possible man to be my staff composer,as it were, at that time.

I am aware of the fact that he does get money but I am not concerned with that issue in my negotiating with a Mr. Scott, any more than I would be with a Mr. Weston.

Q You had a similar arrangement or negotiation

with Mr. Weston?

A With every member of our staff.

Q Well, you knew very well when you had that negotiation with Mr. Weston that as musical director of your show he would probably drop some of his own music into the show, didn't you?

A Did I know it?

Q Yes.

A No, I didn't know it at the time.

Q That's right. You hadn't had any experience with musical shows before this, had you?

A Well, except with Bob Wright and with the Carol Burnett show and I was aware that that happened, but I know my needs and I knew what they were at that time.

Now, if Paul decides to drop some of his music in the show and it meets my needs, fine. Or if he wants to write new music and put it in the show and his publishing company, also fine.

My concern is that that show is a good show, that it's a total package and I am delivering quality to the network.

Whether or not Mr. Weston or Mr. Scott are receiving monies from an organization does not interest me.

MR. TOPKIS: Would now be an appropriate time to take our luncheon break?

THE COURT: A very good time and I think on the profound subjects we discussed as a result of Miss Kearse's objections at the outset of the morning, we had best discuss that when we are finished with court today, if we can get finished earlier than we did on Friday, if we can.

MR. HRUSKA: I have some other housekeeping details to raise at that time.

(Luncheon recess.)

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